89-31

No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

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QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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FRIENDS OF WARWICK POND AND HOXSIE
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Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

The Warwick Land Trust* and the individual petitioners (plaintiffs below) hereby pray for the issuance of a writ of certiorari to (a) review, (b) summarily reverse and (c) remand for further proceedings the decision and order of the Supreme Court of the State of Rhode Island in *Friends of Warwick Pond, et al vs Children's Friends and Service, et al*, No. 88-426 — appeal, entered February 23, 1989.

OPINIONS BELOW

The decision and order of the Rhode Island Supreme Court (unreported) is reproduced in the petitioners' appendix, 1-3.**

*Incorporated as "Friends of Warwick Pond and Hoxsie, also Warwick land Trust"

**References, unless, otherwise indicated, are to petitioners' appendix, *infra.*

The decision and judgment of the Rhode Island Superior Court (also unreported) is reproduced at pages 4-5 of the petitioners' appendix.

JURISDICTION

The decision of the Rhode Island Supreme Court was entered on February 23, 1989. A timely petition for reargument (rehearing) was denied on March 13, 1989. (P.A. 3, 45-46). The jurisdiction of this Court rests on 28 U.S.C., Sections 1257 and 2106 and Supreme Court Rule 17.

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure* to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority** and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants'

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*The two rules (R.I. and Federal Rules 56) are identical in all respects. *Nichola v John Hancock Mutual Life Insurance Co.*, 471 A.2d 945, 947, (R.I. 1984)

**Also based on Rhode Island's adoption of Federal *res judicata*/fundamental jurisdictional principles, page 9 n *infra*.

sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence* was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

Amendment XIV, Section 1, of the Constitution of the United States which provides:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 56 of the Rhode Island (and Federal) Rules of Civil Procedure, reproduced in petitioners' appendix, *infra.* (P.A. 7-10)

Rhode Island General Laws, Section 18-9-5, reproduced in petitioners' appendix, (P.A. 6)

STATEMENT OF THE CASE

A. R.I. Superior Court Proceedings

This class action suit is focused on some twenty acres of

*The Attorney General had an opportunity to solve this puzzle in his March 13, 1989 response to the plaintiffs' February 28th reargument petition but chose not do so.

charitable, recreational primarily open land adjoining Warwick Pond ("Lakeside"). The property had been acquired in 1912-16 by the initial charitable holder (Providence Society for Organizing Charity*) with funds specially solicited from community members for the purpose of aiding its pre-existing recreational and remedial programs - handicapped from lack of a permanent location under its control - and was so used for the following 70 years. See, pages 23-24 *infra*, P.A. 11-12, 20-29 and cited sources.

The petitioners are taxpaying homeowners who live in close proximity to Lakeside and enjoy its beauty. Through this suit the petitioners seek to prevent serious monetary, recreational and environmental damage to their homes and their community which, as alleged in their verified pleadings and confirmed by distinguished expert opinion, will surely happen if this land is misappropriated for private development. (P.A. 15-16, 23-29)

Respondent Children's Friend and Service ("CF&S") acquired *cy pres* title to the premises in 1951 without monetary payment pursuant to R.I. Superior Court *cy pres* proceedings brought by the initial charitable donee, *Family Service Inc v William E. Powers, Attorney General*, No. 21550. (P.A. 11-14) The subsequent April 1951 recorded deed transferring the Lakeside property, without monetary payment, from the Society to CF&S, both identified therein as charitable corporations, specifically provided that the Society's transfer was:

> "...pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951 in that case entitled *Family Service, Inc. v William E. Powers*, Attorney General of the State of Rhode Island, Eq. No. 21550...."

and that the property was:

*Subsequently renamed Family Service, Inc.

"...to be *held** by said Children's Friend and Service for its general uses and purposes."**

(P.A. 13-14, Emphasis added)

The Superior Court's aforementioned February 16, 1951 *cy pres* decree (Walsh, P.J.) provided:

"This cause came on to be heard on the bill, answer and *proof* and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit *continued* carrying out of the *charitable purposes* for which said real estate has heretofore been *held and used* by Family Service, Inc., and is also *consistent* with the *intentions* of the persons who *caused* the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, *to be held* for *its general uses and purposes.***

(P.A. 11-12, Emphasis added)

The aforementioned *cy pres* order was, in itself, controlled by the R.I. *cy pres* statute (R.I.G.L., Sec. 18-4-1) which declares:

"In *all* cases of charitable gifts of real or personal estate, whether by deed or will, where the *purposes of the donor* cannot be literally carried into effect, a complaint may be filed for a *cy pres* application of the *trust property;* and *thereupon all* such proceedings, orders and decrees *shall be had and taken* in said suit, to carry out *the intents of the donor* as *near* as may be, *that such charity may not fail,* and to this end application as aforesaid may be made in the same complaint for appointment of new trustee or trustees under or pursuant to the provisions of sections 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court."

(Emphasis added)

Petitioners challenge CF&S' June 1987 efforts to by-pass the Superior Court's pre-existing, continuing, mandatory jurisdiction and, on its own initiative without Superior Court authority, to *sell* this charitable land for private development and thus permanently change its use from community charity and enjoyment to private develop-

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*"To hold is defined "*a*, to have and keep in one's grasp. *b*, to keep up, support...*c*, to maintain in a certain position or relationship...*d*, to keep in reserve or custody..." *The American Heritage Dictionary, Second College Edition* (1982)

**Exclusively charitable (P.A. 11-14)

ment and profit (P.A. 16, 20-24). Their initial verified class action complaint was the subject of a CF&S August, 1987 12(b)(6)* motion to dismiss. CF&S' primary argument was that the petitioners lacked standing and that only the R.I. Attorney General could sue for breach of charitable trust. Memoranda were submitted by both sides. CF&S' memorandum conceded the *cy pres* source and admitted the *trust* nature of its title. (*Id.*, P.A. 19-20, 30-31)

Although named in the complaint and duly served by both sides, the Attorney General submitted no papers and did not appear at the August 24, 1987 oral argument before Judge Bulman. (The Court was informed, by CF&S counsel, that while the Attorney General did not join in CF&S' motion he would not "object" if the Court, acting without his urging, should choose to grant CF&S' application.) The Court denied CF&S' motion and held that the petitioners' were entitled to proceed with full pre-trial discovery ("get their licks in"). (P.A. 19-20, 23) No appeal was attempted and, most significantly, no effort was made by any party to invoke certification. The Attorney General could have readily taken this step even without court permission if, as R.I.G.L., Section 19-24-27 provides, he was prepared to certify that in his opinion the question was:

> "...of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings..."

A subsequent CF&S motion, invoking rule 56,** but now denying trust title, was served April 26, 1988. (P.A. 15-16, 42-44) Petitioners' discovery, although diligently pursued was, (and still is) far from complete. Petitioners' outstanding discovery included (1) their pending motion to compel production of *complete,* unexpurgated - (rather than *50-75%* in some instances 90% deleted) copies of

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*Identical to F.R.C.P. 12(b)(6)

**Identical to F.R.C.P. 56

CF&S' contemporaneous 1950-51 directors' minutes; (2) their pending notice to depose CF&S by its summary judgment affiant, president Aitken and (3) other outstanding deposition notices and document requests addressed to the movants (P.A. 18-20, 24, 32-44 and sources cited therein).

In opposition petitioners submitted a 28 page memorandum of law plus an affidavit of Warwick Land Trust president Paul Huling, both incorporating petitioners' supplemental answers to interrogatories (60 pages, including appended historical documents obtained from Lakeside's initial charitable holder), their amended verified complaint, filed March 31, 1988 (30 pages including exhibits) and their outstanding discovery demands and motions (P.A. 15-25 and sources cited therein). Matters briefed by the parties (except the Attorney General) included petitioners' standing to bring the action (previously briefed before Judge Bulman); the initial charitable holder's documented forty years recognition and confirmation of the fiduciary duties arising from its acquisition of Lakeside with specially solicited community funds; CF&S' claim that it held Lakeside in fee simple absolute without restriction (notwithstanding the 1951 *cy pres* source and its 1987 aforementioned August, 1987 memorandum admission of its trust title); and, as indicated above, petitioners' outstanding discovery. (*Id*, P.A. 11-12, 15-25, 32-44)

The Superior Court (Bourcier, J.) granted CF&S summary judgment pursuant to June 13 bench ruling and July 1, 1988 decree. No written opinion was entered. The Court's sole ultimate July 1, 1988 decree finding was that the land at issue ("Lakeside") was "not subject to the application of the *cy pres* doctrine of law which

pertains to trust property..."* A timely appeal to the R.I. Supreme Court was taken on July 6, 1988. (P.A. 1-5).

B. R.I. Supreme Court Proceedings

Following submission of pre-briefing statements, a single justice conference was conducted on November 29, 1988. An order was then entered, following defendants' application therefor, directing all parties to show cause why the issues raised by the appeal should not be summarily decided. The issues as listed therein were:

> "(a) whether a question of fact exists which should have precluded the entry of summary judgment,
>
> (b) whether the trial justice erred as a matter of law in granting summary judgment even if no question of fact was disclosed on the record,
>
> (c) whether the plaintiffs had standing to challenge the conveyances**.
>
> (d) whether issues presented by the parties have been preserved for appellate review." (*Id.*)

The petitioners were given leave to file a memorandum not

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*The "trust property" phrase in the R.I. *cy pres* statute refers not to an express trust as defendants argued, but rather to "property held upon charitable trust." *City of Providence v Payne*, 47 R.I. 444, 455, 133 A. 621 (1926). Presiding justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by the initial recipient, the Providence Society for Organizing Charity (now known as Family Service, Inc.) and therefore within Superior Court *cy pres* authority. Judge Bourcier clearly thought that Judge Walsh had been mistaken in making that determination and because it pertained to jurisdiction, that he was free to rule otherwise – 37 years later and on summary judgment. June 13, July 1, 1988 transcript 21, 27-29, 39 ("That is jurisdictional when you come down to it. Jurisdiction can be raised any time, notwithstanding the erroneous assumption of jurisdiction in the previous situation (*sic*). That concludes the matter. We'll stand in recess." *Id* 39. As demonstrated at pages 17-24, *infra* Judge Bourcier was wrong on two counts of R.I. adopted Federal law - (1) *res judicata* and (2) Rule 56 summary judgment principles.

**While otherwise adopting the defendant-appellees' contentions, the Attorney General expressed no exception to his having been "incuded as a defendant (additional party) in Superior Court as well as a co-appellee pursuant to Rhode Island General Law 18-9-5. This statute (reproduced at P.A. 6 *infra*) requires that the Attorney General shall be notified of all judicial proceedings affecting, or in any manner dealing with a charitable trust... and shall be deemed an *interested* (sic) party thereto." *Id*, emphasis added. See page 6 *supra*.

exceeding 15 pages by January 15, 1989. Defendants' briefs were due February 7, 1989. Oral argument was subsequently scheduled for February 13, 1989. Matters briefed by the parties (except the Attorney General who adopted defendant R&F's memorandum), included (a) the initial charitable holder's documented forty years' recognition and confirmation of its charitable trust duties arising from its acquisition of Lakeside with specially solicited community funds; (b) the binding *res judicata* effect of the R.I. Superior Court's 1951 decree that Lakeside was charitable trust property; (c) the Superior Court's exclusive, continuing, mandatory jurisdiction over Lakeside's title and use; (d) CF&S' repeated admissions of trust title in its August, 1987 Superior Court memorandum; (e) the impropriety of granting Rule 56 summary judgment where the movants (1) were resisting discovery and (2) at most had only conjured up a mixed question of law and fact concerning the doctrine of charitable trusts; and, for the third time, (f) the petitioners' right to maintain their action.* *Id.*

Oral argument (10 minutes for petitioners and 30 for respondents) was conducted, as scheduled, on February 13. During the oral argument — when its existence surfaced for the first time — and again in its February 23 order/decision, the Court was visibly impressed by an alleged Attorney General opinion or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development. The record, as indicated above at page 3 *supra*, contains *no* such opinion or finding - written or oral. Indeed, the

*While primarily briefed in terms of state law each of these issues involved adopted Federal rules and case law. E.g. *Air-Lite Products, Inc. v Gilbane Building Company*, 347 A.2d 623, 629-31 (R.I. 1975) - *res judicata*; *Hartt v Hartt* 397 A.2d 1178, 1180 (R.I. 1979) and *State v Souza* 456 A.2d 775, 779 (R.I. 1983) *res judicata* and subject matter/fundamental jurisdiction; *Matunuck Beach Hotel, Inc. v. Sheldon*, 399 A.2d 489, 493 (R.I. 1979) and *Berberian v. Solomon*, 405 A.2d 1178, 1180 (R.I. 1979) - standing; *Nichola v John Hancock Mutual Life Insurance Co. supra* and *Steinberg v State* 427 A.2d 338, 339-340 (R.I. 1981) - Federal Rule 56 and summary judgment decisions.

record shows that the Attorney General was given *no* advance notice of the proposed sale* (P.A. 1-3, 18-19).

The Court's two page decision, signed by the clerk and summarily denying the petitioners' appeal, was entered February 23, 1989. Under the rule, petitioners had five days, i.e. until February 28, 1989, to prepare and file a petition for reargument.** The petitioners did so. (P.A. 1-3, 45-46).

In their February 28 application for reargument, the petitioners asserted that crucial matters presented in the various briefs and relied upon at the February 13 oral argument had been overlooked or misapprehended; that the Court's order/decision contained or represented clear error; and that such error was appropriately demonstrated when viewed in three parts:

> (1) The Court's statement that only the Attorney General has standing to bring suit regarding breach of charitable trust;
>
> (2) the undertaking of the Superior Court, if not the R.I. Supreme Court, to decide on summary judgment mixed questions of law and fact relating to
>
> > (a) the trust nature of the Lakeside property; and
> >
> > (b) whether the 1951 conveyance authorized by Judge Walsh's *cy pres* order constituted an unrestricted fee simple transfer; and
>
> (3) The Court's indicated reliance on an unpublished, non-record Attorney General opinion or finding of "no fault" in CF&S' unilateral sale of the Lakeside property for commercial real estate development.
>
> (*Id*, p.1)

The petition for reargument, following written responses by defendant R&F Associates and the Attorney General (containing no mention of his foregoing "opinion"), was denied without comment by

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*CF&S' failure to give the Attorney General specific statutory Superior Court notice is, in itself, grounds for nullifying the June, 1987 conveyance. *Donnelly v Israel*, 113 R.I. 29, 317 A.2d 443 (1974), construing R.I.G.L., Sec. 18-9-5, *supra*.

**Petitioners' copy of the Court's February 23 decision, enclosed in an envelope metered February 24 and postmarked February 25, was not received from the Court until Monday, February 27, 1989. (*Id*, noted in counsel's February 28 letter, enclosing petition for reargument.)

deputy clerk order entered March 13, 1989. While the R.I. Supreme Court Rules contain, (as a clerk reminded counsel), no provisions for further application, petitioners, by March 16 filed letter, notified the R.I. Supreme Court and all parties of their intention to seek relief from this Court because, *inter alia*, of the denial of their Fourteenth Amendment due process and equal protection rights. (P.A. 45-46)

REASONS FOR GRANTING THE WRIT AND SUMMARY REVERSAL FOR FURTHER PROCEEDINGS

Petitions brought this action to protect their homes, their neighborhood and their environment - the most fundamental property and liberty rights which anyone can have.* They were simply "railroaded".**

Lakeside is a mid-Rhode Island environmental oasis. The property's flora, fauna, fish, brook tributary/estuary to Narragansett Bay and marshlands constitute a biologically unique ecosystem. There is nothing like it for miles — an environmental enclave bounded as it is by an airport, shopping center and existing residential development. Lakeside's environmental significance, its recreational and educational potential and its value to the entire Warwick, R.I. community, is best demonstrated by the annexed February 20, 1987 letter from R.I. Audubon Society executive director Alfred L. Hawkes to the petitioners, written when they were first beginning their dedicated battle. (P.A. 26-29)

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*"Congress in 1949 called for the realization as soon as feasible of the goal for a decent home and a suitable environment for every American Family." *Housing America in the 1990s*, 30th annual Symposium Program, Columbia Law School, April 29, 1989. By looking out its windows the Court can judge how far our country has come in "achieving this goal"...*Id.*

**_Celotex v Catrett_, 477 U.S. 317, 326 (1986). See also 6 *Moore's Federal Practice*, Sec. 56.02(1) and decisions therein discussed.

The Court should not allow petitioners' struggle to be lost so early and so cheaply. As Smithsonian Institution biologist Thomas Lovejoy warned in his chilling April, 1988 prediction to the American Institute of Biological Sciences:

> "I am utterly convinced that most of the great environmental struggles will be won or lost in the 1990's, and that by the next century it will be too late."
>
> *Decade of Decision,* Tom Wicker,
> New York Times, February 28, 1989

These struggles will be fought on all levels — local, national and international — and by many people including government leaders, institutional professionals and, in this case, local community residents. Two decades ago, in *Citizens to Preserve Overton Park, Inc. v Volpe,* 401 U.S. 402, 404 (1971), the Court noted the growing concern about the quality of our natural environment that has prompted Congress in recent years to enact legislation to curb the accelerating destruction of our country's beauty. The need is now crucial. Environmental battles must be fought and (hopefully) won. This Court, at the very least, should seize every opportunity to ensure that these struggles will be fought under rules of fair play.

The petitioners, after having survived a threshold motion challenging their right to protect Lakeside, and after having demonstrated, in spades, the "concrete adversity" that sharpens issues, the very objective which Rhode Island's adopted Federal "injury in fact" test is designed to ensure (in pursuit of pre-trial discovery to which the threshold judge declared they were entitled), were suddenly terminated by a patently untenable summary judgment in violation of Rhode Island's adopted Federal Rule 56 and case law. (P.A. 16-25, 4-5) The R.I. Supreme Court, through a "summary procedure" not equal to the issues, then sealed the result in a two page, clerk signed decision (1) ignoring and plowing under

four prior R.I. Supreme Court decisions and a statute to boot* — that the state Attorney General was *not* the sole person who could sue for breach of charitable trust; and (2) giving weight to an unpublished, non-record Attorney General "opinion" which the petitioners have never seen and whose very existence must be doubted. All of this, as the petitioners stressed in their February 28, 1989 petition for reargument** was "manifestly unfair..."***. [The R.I. Supreme Court scarcely needed reminding of the resultant denial of Fourteenth Amendment due process and equal protection.****]

DENYING PETITIONER'S STANDING WAS PATENTLY UNTENABLE

The R.I. Supreme Court's adverse, retroactive ruling on the petitioners' standing was just wrong. Petitioners at the very outset, satisfied the R.I. adopted Federal "injury in fact" test*****, as demonstrated by the Superior Court's unappealed August, 1987 decision denying defendants' Rule 12(b)(6) motion (P.A. 19-20) *Matunuck Beach Hotel Inc., v. Sheldon*, and *Berberian v. Solomon, supra* citing *inter alia, Sierra Club v. Morton* 405 U.S., 727 (1972). Having negotiated this "access barrier" (standing) the petitioners then proceeded to devote time, money and effort — the "concrete

*R.I.G.L., Sec. 18-9-5 *supra*, page 3 and P.A. 6.

**Hastily prepared in the precious little time available, page 10 n. *supra*.

***As the Court noted 35 years ago, the concepts of equal protection of the laws and due process "both stem from the American ideal of fairness..." *Bolling v Sharpe*, 347 U.S. 497 (1954).

****Petitioners March 16, 1989 letter (P.A. 45-46); see page 11 *supra*.

*****Petitioners also satisfied the alternative test, which the R.I. courts had previously "carved out", permitting representative plaintiffs to proceed even without allegations of personal injury in cases involving substantial public issues which might be rendered moot if they were not allowed to proceed. *Blackstone Valley Chamber of Commerce v Public Utilities Commission* 452 A.2d 931, 933 (R.I. 1982); *Berberian v. Solomon supra*. Indeed, the failure of the Attorney General (or others) to commence or join this suit, to protect such unique recreational and environmental property, is positive proof of the alternate R.I. standard (P.A. 18-19).

adversity" that sharpens issues — the very objective which the "injury in fact" test is designed to ensure. See *Blackstone Valley supra* at 933, citing *Baker v Carr* 369 U.S. 186, 204 (1962). (P.A. 19-25).

The petitioners* sue to prevent serious monetary, recreational and environmental damage to their homes and community which will surely happen if this community asset is misappropriated for private use and development.** The standing of similarly situated petitioners was not even questioned in *Citizens to Preserve Overton Park, Inc. v Solpe, supra.* The Court so noted in *Sierra Club v Morton, supra* at 734, a decision frequently cited in Rhode Island on standing issues. E.g. *Berberian v Solomon, supra* at 1180, *Blackstone Valley, supra* at 933 and 934.

The stated grounds for the R.I. Supreme Court's February 23 retroactive declaration that the petitioners have no right to bring this action was the bald, clerk signed assertion that "{O}nly the Attorney General has such standing." (P.A. 1-3) No statute, case law or other authority was cited. There is none. Four prior R.I. Supreme Court decisions — *Newport Hospital v Harvey,* 47 R.I. 382, 383, 133 A. 648 (1926); *Powers v Home for Aged Women,* 55 R.I. 187 at 192, 179 A. 610 (1935); *:Leo v Armington,* 74 R.I. 124, 59 A.2d 371 (1948); and *Israel v National Board of Y.M.C.A.,* 117 R.I. 614, 618, 369 A.2d 646, 649 (1977); and R.I.G.L., Sec.18-95- *supra* — all demonstrate that the Attorney General is *not* the sole person

*One is an abutting owner (P.A. 15, 23-24, and cited sources.)

**The economic value of open land to neighboring residents has been confirmed by recognized experts. The defendants, including some with real estate development experience have not challenged the plaintiffs' verified estimate that homes on or near Warwick Pond (to the west of Warwick Avenue) will lose at least 10 percent of their value should defendants ever proceed with their intended development. (P.A. 23-24) Lakeside's "non-economic" value, i.e. its environmental significance, its recreational and educational potential and its wortth to the entire Warwick community in its present undeveloped state, is demonstrated by R.I. Audubon Society executive director Hawkes' February 10, 1987 letter to the organizational petitioner (P.A. 26-29).

who may bring suit to enforce charitable trust duties and that making him a party, as the petitioners have done, is sufficient.* A copy of Section 18-9-5 is reproduced herein.** (P.A. 6). It provides for notice and participation opportunity, nothing more.

Having been made a party, the Attorney General has been given every opportunity to participate in this case and thus ensure that the public's rights are fully protected. This is all that *Newport Hospital* (1926), *Powers* (1935), *Leo* (1948), *Israel* (1977) and R.I.G.L., Sec. 18-9-5 (1956), *supra* require.

As the R.I. Supreme Court, re-declared in *Israel**** at 649:

> " 'It is well settled in this state and elsewhere that the attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and that he should be made a party in any suit in which the existence of the validity of such a trust or such a bequest is really in question or the administration of such a trust is involved.' *Powers v Home for Aged Women*, 55 R.I. 187, 192, 179 A. 610, 612 (1935). Accord, *Leo v Armington*, 74 R.I., 124, 59 A.2d 371 (1948); *Newport Hosp. v. Harvey*, 47 R.I. 382, 133 A. 648 (1926)."

Similarly, as stated long ago in *Annotation*, 62 A.L.R. 881, 885-886 (1929) ("Who may maintain suit or proceedings to enforce or administer benevolent or charitable trusts") — listed as a collateral reference following Section 18-9-5 (P.A. 6):

> "Some cases, at least in the language of the opinion, appear

*The Attorney General himself seemed to agree in his aforementioned November, 1988 pre-argument memorandum, *supra* at page 8n. This position is also consistent with his 1987 failure to invoke certification following Judge Bulman's decision. See pages 5-6 *supra*.

**An earlier 1905 decision, *Stearns v The Newport Hospital*, 27 r.I. 309, 62 A. 132 — cited to both courts below — has no application. There, Attorney General Stearns had already commenced suit; clearly there was no reason for the Newport Mayor to join him as co-plaintiff.

***A 1977 case which involved R.I.G.L., Sec. 18-9-5, *supra* and its construction (at 651).

> to support the proposition that the attorney general is the only person entitled to maintain a suit to enforce or administer a charitable or benevolent trust. But this is not the general rule, as there are numerous cases set out elsewhere in the annotation in which the action has been held maintainable by other parties than the attorney general; and it seems to be sufficient if the latter is a party to a suit to enforce or administer the trust, either as plaintiff or defendant, for in either event the interests of the public at large, or of the indefinite class of the public who constitute the beneficiaries, are represented and protected."

The rights of community members similarly situated to maintain suit has also been recognized in recent decisions in other jurisdictions - *Parsons v Walker,* 28 *Ill. App.* 3rd 517, 328 N.E. 2d 920, 926 (1975) and *City of Reno v Goldwater,* 558 P.2d 532, 533 (Nev. 1976). The *Parsons* opinion, quoting Illinois' highest court, emphasized the importance of permitting tax paying community homeowners access to the courts to protect unique public use properties like Lakeside:

> " 'If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.' (46 Ill. 2d at 341. 263 N.E.2d at 18)."

In *City of Reno, supra,* the Nevada Supreme Court stressed the aesthetic and recreational value of a public park and playground:

> "The donated property is and has been a lovely small park for many years and continues to be suited to that purpose. Consequently, we are not concerned with donated trust property which has never used for the purposes designated by the gift, or which has become inadequate for such purposes. The plainiffs, respondents here, are taxpayers and residents of the City of Reno who live in close proximity to Newlands Park and enjoy its beauty. Their standing to compel the City to honor its trust is beyond question."

A cause of action is a property right protected by the Fourteenth Amendment. *Logan v Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982); *Mullane v Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). A retroactive, clerk signed opinion depriving taxpaying

homeowners of their access to the courts to protect their homes and their environment from misappropriation of community open land — in favor of an attorney general, who has refused to lift a finger — is an outrage not to be tolerated in these crucial environmental times.

Simply put, the R.I. Supreme Court's February 23, 1989 standing ruling is (a) plainly untenable under the R.I. statute, case law and adopted Federal "injury in fact" test: (b) contrary to the adopted standing rule's most basic purpose and (c) manifestly unfair to these diligent plaintiffs*. It must not stand.

RULE 56 SUMMARY JUDGMENT WAS PATENTLY UNTENABLE

Judge Bourcier wrote no opinion. Although not recognized in the R.I. Supreme Court's subsequent February 23, 1989 decision, his *sole* ultimate summary judgment finding was that Lakeside was "not subject to the application of the *cy pres* doctrine of law which pertains to trust property..." (P.A. 4-5). The "trust property" phrase in the R.I. *cy pres* statute (R.I.G.L., Section 18-4-1, *supra*) refers not to an express trust, as the defendants argued below, but rather to "property held upon charitable trust." The R.I. Supreme Court so noted in 1926 in *City of Providence v Payne, supra* at 455.

Presiding Justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by its initial charitable recipient, and, therefore, within Superior Court *cy pres* authority. Judge Bourcier, in 1988, erroneously thought that Judge Walsh had been mistaken in making that determination and, because it pertained to jurisdiction, that he was free to rule otherwise - 37 years later and on summary judgment.**

*And the neighboring community whom they represent. (P.A. 15-16, 23-25)

**See page 8 n, *supra* quoting July 1, 1988 transcript *supra* ("That is jurisdictional when you come down to it. Jurisdiction can be raised any time, nothwithstanding the erroneous assumption of jurisdiction in the previous situation. That concludes the matter. We'll stand in recess.")

Judge Bourcier was wrong for two reasons -- (1) *res judicata* and (2) summary judgment doctrine.* Judge Walsh possessed jurisdiction in the "fundamental sense" as defined in two recent R.I. Supreme Court decisions — *Hartt v Hartt, supra* and *State v Souza, supra* adopting and applying, *inter alia, Bradley v Fisher,* 80 U.S. 335 (1872) and *Stump v Sparkman,* 435 U.S. 349 (1978). All necessary parties (including the R.I. Attorney General) were before the Superior Court and asked it to exercise power in an area where the court was authorized to act. The respondents were therefore barred and estopped and the Superior Court lacked authority to overrule its 1951 determination. [This was not a situation where the court had declared counsel a "General in the Mexican Army" a crucial distinction not recognized by the court below, (argument transcript *supra* 29, 39).] See, also, *Auto - Lite Products, Inc. v Gilbane Building Company, supra* and *Petition of Downer Home,* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-449, (1975).

Judge Bourcier was wrong in his 1988 overruling and reversal of Judge Walsh's 1951 charitable trust finding regarding Lakeside. The R.I. Supreme Court was wrong in failing to recognize that error in light of its recent decisions in *Hartt* and *Souza, supra.* Yet, even assuming that Judge Bourcier was not bound by Judge Walsh's 1951 charitable trust determination (which he clearly was), *both* courts below also erred by ignoring Rule 56 and summary judgment doctrine** — "issue finding, not issue determination." E.g. *Industrial National Bank v Peloso,* 397 A.2d 1312, 1313 (R.I. 1979).

This record - even with important discovery demands outstanding, including document requests and deposition notices addressed to the

*Both based on Rhode Island's adoption of such principles of Federal law. See page 9 n, *supra* and decisions cited therein.

**As noted earlier at pages 2, 6 and 9 n, *supra,* R.I. and F.R.C.P. Rules 56 are identical in all respects; in construing Rule 56 Rhode Island courts are "guided by Federal decisions..." *Nichola, supra* at 947.

moving parties themselves (another factor not recognized below) — contains substantial evidence that Lakeside was charitable trust property which the defendants, at the appellate level, again failed to mention much less discuss. Indeed, commencing with the Society's 1911-12 solicitation of community donated funds to acquire the Lakeside property in aid of pre-existing, yet handicapped recreational and remedial programs, and continuing over the next forty years, Lakeside and the Society's relationship with it constituted a continuous narrative of charitable trust. (P.A. 11-12, 20-23; see discussion at pages 23-24 *infra*).

When viewed against such documented, unchallenged historical facts and the R.I. courts' prior decisions favoring the recognition and the preservation of charitable trust gifts, Judge Walsh's 1951 acceptance and exercise of *cy pres* authority over Lakeside, as charitable trust property, was most appropriate.* Thus, regarding Judge Bourcier's finding (P.A. 4-5), the record presents, at most, a mixed question of law and fact. To decide that issue on summary judgment was clear error. *Nichola v John Hancock Mutual Life Insurance Co., supra* citing *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 157-61 (1970); *Anderson v Liberty Lobby, Inc*, 106 S. Ct. 2505 (1986) — (see Rehnquist, C.J., dissenting at 2522); *Kirkpatrick v Consolidated Underwriters*, 227 F.2d 228, 231 (4th Cir. 1955, Parker, C.J.) and decisions quoted and re-quoted therein.

Nevertheless, without mentioning the Superior Court's *sole*

*A charitable trust is not governed by technical requirements. The only requirements for *cy pres* jurisdiction are general charitable intent and public utility purpose. If broad inquiry including extrinsic evidence, reveals a "gift for the purpose and not the person" and if the purpose is that of "[unstained] public usefulness," its charitable character "insures its validity." *Pell v Mercer*, 14 R.I. 412, 435, 438 (1984); *R.I. Hospital Trust v Benedict*, 41 R.I. 143, 147-148, 150, 103 A. 815 (1918); *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 30, 134 A. 815 (1926); *R.I. Hospital Trust v Williams*, 50 R.I. 385, 389, 390-391, 393, 148 A. 189 (1929); 15 *Am Jur 2nd Charities*, Sections 5-6 (1976).

finding (or any statutory or case law), the R.I. Supreme Court's February 23 decision/order would uphold summary judgment by declaring that Judge Bourcier made a *further* finding, i.e. that the 1951 *cy pres* conveyance to CF&S was in "fee simple, without any charitable restrictions whatever." (P.A. 2) Judge Bourcier strongly indicated an intention to find just that on June 13 oral argument (Transcript 32) but, significantly, made no such declaration in his July 1 decision, apparently determining, upon further reflection, that all issues turned on whether Lakeside was charitable trust property. See pages 8 n and 17 *supra*. However, even assuming a distinct finding that the 1951 conveyance to CF&S was in "fee simple, without any charitable restrictions", the record again shows nothing more than a mixed question of law and fact and thus improper for summary judgment determination.

Moreover, CF&S made repeated admissions of trust title in its initial August 1987 memorandum. (P.A. 30-31). Such admissions of trust title — also ignored by both courts below — sufficed in themselves to preclude summary judgment. *Cerqueira v Cerqueira*, 828 F.,2d 863, 865 (1st Cir. 1987); *United States v One Heckler - Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980); 10A C. Wright, A. Miller & H. Kane, *Federal Practice, and Procedure*, Section 2723 at 65-66 (1983). As stated in Wright, *supra*:

> "However, *admissions* in the brief of the party *opposing* the motion may be used in determining that there is no genuine issue as to any material fact, since they are functionally equivalent to "admissions on file," which are expressly mentioned in Rule 56(c) and are discussed in the preceding section. *Conversely*, an admission in a brief may show that there is an issue to be tried."*
>
> (Emphasis added)

*Because *Cerqueira v Cerqueira* adopted the reasoning of the authority cited above, the Rhode Island courts now stand in direct conflict with the First Circuit in their treatment of admissions, not to mention other principles of Rule 56 summary judgment. Rule 17.1(b)

[In a similar, almost *verbatim* restatement in its subsequent 1988 summary judgment memorandum, giving no explanation whatever, CF&S inserted the qualifying words "alleged" or "any alleged" trust. Compare P.A. 30-31 with P.A. 42-44. Similarly, CF&S made no mention of this matter in its appellate papers.]

CF&S has produced no letter, memorandum or other contemporaneous (1950-51) document which shows an intention to convey "fee simple (title), without any charitable restriction whatsoever." (Court's February 23, 1989 order/decision P.A. 1-3). Indeed, CF&S has doggedly *refused* to produce (and plaintiffs' outstanding discovery demands include) the very contemporaneous records which one would expect to shed light on CF&S' Lakeside title expectations, i.e. *complete*, unexpurgated - (rather than *50-75%* in some instances *90% deleted*) copies of CF&S' 1950-51 directors' minutes. (P.A. 32-44) Such resistance to discovery - again ignored by both courts below — also precludes summary judgment. *Quinn v Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445, (2nd Cir. 1980); *Sames v Gable*, 72 F.2d 49, 51 (3rd Cir. 1984); *Rolnick v El Al Airlines, Ltd.*, 551 F. Supp. 261, 264, (D.C. N.Y. 1982). As Chief Judge Kaufman observed in *Quinn supra* at 445:

> "Quinn's showing appears stronger still in light of defendants' successful efforts to resist discovery. Judge Munson's decision, after oral argument on the motions to treat defendants' motions as a request for summary judgment denied plaintiff a reasonable opportunity to elicit information within the control of his adversaries. At least when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information. (Citations omitted)"

Equally appropriate, in light of CF&S' failure to produce its 1988 chief executive (and sole summary judgment affiant) for oral examination is Judge McLaughlin's statement in *Rolnick, supra* at 264:

> "Although it thus appears that the airline is not liable for the dangerous condition, the plaintiffs must be granted an opportunity to depose defendant's supervisor on the ownership and control issue. This conclusion follows from the principle that

summary judgment is inappropriate when, as here, a disputed fact is peculiarly within the knowledge of one of the parties. (Citations omitted)"

Significantly, no case has been found - before this one - and none has been cited by the respondents (or the courts below) — where once *cy pres* has been invoked, a successor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld. Indeed, as noted above, before changing its mind on summary judgment, CF&S made repeated admissions of trust title in its August 1987 memorandum (P.A. 30-31, 42-44). Plaintiffs have the right to a presumption, certainly on summary judgment where pleadings, affidavits, documents and conflicts must be viewed in a "light most favorable to the opposing party," that CF&S was right the first time.* Petitioners received no such consideration from the courts below.

RELIANCE ON AN UNPUBLISHED, NON-RECORD ATTORNEY GENERAL'S OPINION WAS PATENTLY UNTENABLE

During the February 13, 1989 oral argument - when its existence first surfaced - and again in its February 23 order/decision, the R.I. Supreme Court was visibly impressed and gave weight to an Attorney General "opinion" or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development. (P.A. 1-3). This was manifestly unjust. The record contains *no* Attorney General opinion or finding, written or oral.** Indeed, the Attorney General was given no advance notice of the proposed sale.*** (P.A. 18-19)

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*E.g. *Nichola v John Hancock Mututal Life Insurance Co., supra* at 947-48; *Steinberg v State, supra* t 340; and *Adickes v S.H. Kress & Co., supra* at 158-159.

**As noted at page 3 n *supra*, the Attorney General had an opportunity to shed light on his omission in his March 13, 1989 memorandum, filed in response to the plaintiffs' application for reargument, but chose to make no mention of the matter (*Id*).

***CF&S' failure to give the Attorney General specific statutory Superior Court notice is in itself, grounds for *nullifying* the June, 1987 conveyance. *Donnelly v Israel, supra*

Disclosure of documentary evidence and the opportunity to confront and cross examine adverse witnesses are so basic to due process as to have "remained relatively immutable in our jurisprudence." *Goldberg v Kelly*, 397 U.S. 254, 259-270 (1970) quoting *Greene v McElroy*, 360 U.S. 474, 496-497 (1959). No state high court should have to be reminded of the gravity of any failure to observe these Constitutional requirements.

Moreover, having allowed itself to be diverted by a phantom document, the R.I. Supreme Court ignored declarations and opinions which *were* part of the record or contained in the case law briefed below. These included:

1. The initial charitable holder's* acknowledgment of its charitable trust duties by placing the Lakeside property's "management and control" in the hands of a special, newly constituted board of trustees ("Real Estate Managers") as confirmed by a 1920 Society committee report signed by Mssrs, Sharpe and Gardner. (*Id*, plaintiffs' supplemental answers to interrogatories, *supra*, No. 5 at pp. 7-8)

2. The 1936 opinion of a most distinguished Rhode Island lawyer, George H. Huddy, Jr. (after reviewing and have his recollection refreshed by a 24 page memorandum and appendix summarizing the Lakeside history) that:

> "...in view of the conditions under which (the Lakeside) property was purchased, the .... Society was obligated to continue to hold title as trustees for those purposes for which the property has been placed in its name."
>
> (P.A. 21-23)

3. The echoing Society* declaration eleven years later, in December, 1946, upon written recommendation of its president, former R.I. Attorney General Charles P. Sisson (in response to a proposal that Lakeside be deeded to a children's hospital center), that affirmative consideration would be given provided the

*Providence Society for Organizing Charity, now known as Family Service, Inc.

> "...proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society"
> (*Id,* plaintiffs' supplemental answers to interrogatories *supra,* No. 13 at p. 20)

4. The answer of R.I. Attorney General Powers to the Society's February 1951 petition declaring that his office would consent to its *cy pres* application, provided appropriate *proof* was presented and which, as Judge Walsh's February 16, 1951 decree confirms, was in fact given. (*Id.*; P.A. 11-12; plaintiffs' supplemental answers *supra*, No. 9)

Indeed, the R.I. Attorney general's 1951 response and consent to Superior Court *cy pres* authority over Lakeside is just as binding as the Wisconsin Attorney General's was in *Petition of Downer Home, supra,* at 448-449:

> "We deal here and now with the *consequences, not the validity,* of the 1965 court order. However, it is clear that the court in 1965 applied the doctrine of *cy pres* to redefine the purpose of the trust and the authority of the trustee. So we are puzzled by the *state's now contending* that *cy pres* is *not* applicable to this trust fund after sale of the Downer Home * * * The State *could have sought termination* of the *trust* in 1965 when the Downer Home was sold. It is not likely that it would have succeeded, but, having *consented* to the sale of the real estate and modification of trust purposes in 1965, it certainly *cannot now claim* that *cy pres* was then inapplicable."
> (Emphasis added)

5. The continuing jurisdiction which the courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee, as recognized by the R.I. Supreme Court and the R.I. Attorney General in *City of Providence v William E. Powers* 83 R.I. 512, 514, 120 A.2d 81 (1956):

> "The complainant city concedes that it never intended to bring a bill solely for a construction of the will and that the amended bill under consideration is not of that character. Apparently its theory is based on its own interpretation of this court's opinion in *City of Providence v Payne,* 47 R.I. 444 (1926). It claims that the issue as to the nature of the testator's intent was thereby determined; that this court decided therein that

> the testator had a *general* rather than a special charitable intent; and that, at least by implication, the Superior Court could proceed to apply *cy pres whenever efficient administration of the trust became impractical* because of *material changes* in circumstances. *Apparently this view is shared by the attorney general of the state, the original respondent."*
>
> (Emphasis added)

6. The Superior Court's exclusive *cy pres* responsibility regarding charitable properties like Lakeside, once the court's authority has been invoked, as aptly described in *Belcher v Conway*, 1979 Conn. 198, 425 A.2d 1254, 1257-1258 (1979):

> "It is clear that once the authority of the court is invoked, the ultimate responsibility for the application of the doctrine of *cy pres* or approximation to the charitable trust lies *with the court and not with the trustees* or the attorney general. (Citations omitted)"*

Needless to say, the petitioners would relish the opportunity - upon summary reversal and remand - to uncover** this missing R.I. Attorney General's "opinion" and subject its assumptions, reasoning and conclusions to real scrutiny. Fair play and due process requires nothing less.

THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

This case turns on state adopted Federal law, i.e. injury-in-fact standing, *res judicata* and its application to fundamental/subject matter jurisdiction, and F.R.C.P. 56 and summary judgment doctrine. All of these matters were briefed and re-briefed below.*** See pages 5-11, 7-20 *supra*.

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*Other decisions and authority conforming the Superior Court's exclusive, continuing jurisdictions include: *South Kingstown v Wakefield Trust Co., supra* at 32; *City of Providence v Powers, supra* at 514; *Faunce v Peoples Savings Bank*, 46 R.I. 75, 80, 124 A. 731 (1924); 15 *Am Jur 2d, Charities* Sec. 159 and, of course, the mandatory language of R.I.G.L., Sec. 18-4-1 ("shall") *supra*.

**R.I. and Federal Rules 34 are also identical.

***The sole exception was the Attorney General's "opinion" which, as noted at pages 3 and 23 *supra*, did not surface until the February 13, 1989 appellate oral argument. This matter was briefed in the petitioners' February 28 application for reargument. Contrary positions taken by prior Attorneys General were mentioned in earlier briefs in both courts below.

There is no state law to support the result below. Under these circumstances United States Supreme Court review is not only appropriate but highly desirable. 16 C. Wright, *supra*, Sec. 4021 at 676; Sec. 4027 at 737-738, Sec. 4031 at 764-765, 768-769. As Wright declares in Sec. 4031 above:

> "The interests in expert and uniform interpretation of federal law are nearly as great as if federal law had directly created the claim or defense. In addition, there is little difference in the need to protect the litigants against mistaken conclusions of federal law. Even if these interests would not be sufficient to create original federal question jurisdiction, they justify Supreme Court review after a completed state court decision has made it clear that federal questions control the outcome." (*Id.* 764-765)

The benefits of Supreme Court review and enforcement are especially apparent when, as here, the interpretation of adopted Federal Rules of Civil Procedure is involved. As Wright notes at page 768:

> "Adoption of federal rules of procedure adds a further interest in achieving uniformity — state courts might believe it very important that state lawyers be able to rely on a single system of procedure in all courts in the state."*

and in conclusion at 769:

> "On balance, it would seem most appropriate to recognize jurisdiction only if state law has incorporated federal law in circumstances that promote the uniform planning of private conduct. State and federal interests in review are strongest in such circumstances, and the dearth of present authority suggests that no substantial burden would be imposed on the court."

Supreme Court review of state court decisions that technically rest on state law, but in fact are determined by voluntary incorporation of federal law by reference, has also been urged by other

---

*States courts do! See, for example, *Brown v Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983), where the Mississippi Supreme Court noted the importance of integrated construction of F.R.C.P. 56 and Mississippi's adopted Rule 56, pointing out that "disparity in interpretation would inevitably lead to forum shopping, which has been a perceived evil for at least half a century."

commentators. See 16 C. Wright *supra* (1988 Supplement) pages 680-681 noting and quoting Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 1985, 19 Ga. L. Rev. 861:

> " '{T}he primary reason for urging Supreme Court review of state decisions that interpret federal law incorporated by reference is to further the interests of interactive cooperative federalism by encouraging a direct dialogue between the highest courts of the two sovereigns.' State courts would benefit from direct exchange with the Supreme Court. The Supreme Court in turn might benefit from direct review of state decisions, and in any event would have available for discretionary review a wider array of fact situations out of which to develop federal law."

Going beyond these federal questions, the Court should also reverse and remand because of the plain error below in breach of federal constitutional standards. *Wood v Georgia*, 450 U.S. 261 (1981); *Vachon v New Hampshire*, 414 U.S. 478 (1974); *Eddings v Oklahoma*, 455 U.S. 104, 117 (1982) (O'Connor concurring). Respondents should not complain that such federal constitutional error was not technically argued until very late below. (See pages 10 and 13 *supra*; P.A. 45-46).

Regarding standing, petitioners could hardly have anticipated that the R.I. Supreme Court would plow under four prior decisions and one statute, most recently interpreted in 1977 (*Israel, supra*) and suddenly announce a retroactive rule that only the Attorney General could sue. *PruneYard Shopping Center v Robbins*, 447 U.S. 74, 85 n 9 (1980) citing *Brinkerhoff-Faris Co. v Hill*, 281 U.S. 673 (1930). That such was "manifestly unfair" to the petitioners was firmly stated in their February 28 application fo reargument, words which should have sufficed to remind the court below that due process standards had been breached. See, *Taylor v Kentucky*, 436 U.S. 478, 482 n. 10 (1978) and *Bolling v Sharpe supra*, page 13 n.

As to the Attorney General's "opinion", whose alleged existence did not surface until the February 13 appellate oral argument, the

petitioners' February 28 reargument application made it clear that the court had given weight to a document which the petitioners had never been given no opportunity to examine or answer. No state high court, especially in these times, needs reminding of this breach of fair play or that nothing is more basic to due process than the right to confront and question the opposition's proof. *Goldberg v Kelly, supra.*

The same observations also apply to the lower courts' handling of Rule 56 summary judgment. As noted long ago (1955) in *Kirkpatrick supra*, at 231 and other federal decisions cited and quoted therein, the Constitution guarantees the trial of disputed questions of fact and mixed questions of fact and law; Rule 56 authorizes summary judgment only where it is "quite clear what the truth it..." [quoting Mr. Justice Jackson speaking for the Court in *Sartor v Arkansas Natural Gas Co.*, 321 U.S. 620, 627 (1944).]

The Supreme Court, in any event, has the authority (28 U.S.C. Sec. 2106) to "require further proceedings as may be just under the circumstances." *Wood* and *Eddings, supra* The "circumstances" of this case precisely call for just that.

CONCLUSION

A writ of certiorari should be granted. The judgment of the Rhode Island Supreme Court should be summarily reversed. The case should be remanded to the trial court for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
June 9, 1989

Respectfully submitted,
ROBERT S. STITT
(Counsel of Record)
PEARLMAN, VOGEL & VIOLET
Blackstone Boulevard Terrace
P.O. Drawer 9007
Providence, RI 02940
(401) 726-6200
Attorneys for Petitioners

PETITIONERS' APPENDIX

SUPREME COURT
No.88-426-Appeal

FRIENDS OF WARWICK POND ET AL:

V. :

CHILDREN'S FRIEND AND :
SERVICE ET AL :

ORDER

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants,Children's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of cy pres the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the cy pres doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior

Court is affirmed and the papers of the case are remanded to the Superior Court. Entered as an Order of this Court this 23 day of February 1989.

By Order,

s/

Matthew J. Smith
Clerk

Justice Kelleher did not participate.

* * * *

ORDER DENYING REARGUMENT

Friends of Warwick Pond, et al

vs

Supreme Ct.
No. 88-426-A

Children's Friend and
Service, Inc. et al

O R D E R

The petition to reargue is denied.

Justice Kelleher did not participate.

Entered as an Order of this Court this 13th day of March 1989.

By Order,

s/

Matthew J. Smith
Clerk

STATE OF RHODE ISLAND SUPERIOR COURT
KENT, SC.

WARWICK LAND TRUST, INC., et al

vs KC 87-811

CHILDREN'S FRIEND AND SERVICE, INC., et al

JUDGMENT

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the cy pres doctrine of law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance with Rule 54(b) R.C.P.,

Judgment for the defendants, Children's Friend and Service, Inc., and R & F Associates on their Motions for Summary Judgment will enter upon the entry of this Judgment, the Court havng determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 1st day of July, 1988.

Per Order,

s/ Anthony Piccirilli

_____

Deputy Clerk

ENTER:

s/ Bourcier

_____

Justice

DATED: 7/1/88

18-9-5. Notice to attorney-general of proceedings affecting charitable trust - The attorney general shall be notified of all judicial proceedings affecting, or in any manner dealing with, a charitable trust or affecting, or in any manner dealing with, a trustee who holds in trust within the state property given, devised or bequeathed for charitable, educational or religious purposes, and who administers or is under a duty to administer the same in whole or in part for said purposes within the state, and shall be deemed to be an interested party thereto.

Rule 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part therof.

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) Motion and Procedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

d-Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversary, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established , and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not so respond, summary judgment, if .

appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

FAMILY SERVICE, INC.	;	
	;	
-v-	;	Eq. No. 21550
	;	
WILLIAM E. POWERS, Attorney General of the State of Rhode Island	;	

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and

deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this 16th day of February, A.D. 1951.

Enter:

s/ Walsh, P.J.
2/16/51

By order,

_____
Ass't. Clerk

P.A. 1.

KNOW ALL MEN BY THESE PRESENTS,

that FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by CHILDREN'S FRIEND AND SERVICE, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled "Family Service, Inc. v. William E. Powers, Attorney General of the State of Rhode Island, Eq. No. 21550," does hereby give, grant, bargain, sell and convey unto the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, -

1. That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View

Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:

[Metes and Bounds Discriptions Omitted]

TO HAVE AND TO HOLD the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

IN WITNESS WHEREOF, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be affixed by its officer thereunto duly authorized, and by its board of Real Estate Managers, this 24th day of March, A.D. 1951.

FAMILY SERVICE, INC.

By Lauriston E. Knowlton
President

This consideration is not such as to require that Federal documentary stamps be affixed.

Board of Real Estate Managers
(s/ Henry Sharpe
(s/ Preston H. Gardiner
(s/ Clarence H. Philback
(s/ Robert H. Ives Goddard
(s/ George H. Huddy, Jr.

[Acknowledgments Omitted]

AFFIDAVIT OPPOSING DEFENDANT'S SUMMARY JUDGMENT MOTION

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

PAUL HULING, being duly sworn, deposes that he is a plaintiff herein and, at all material times, president of the corporate co-plaintiff - Friends of Warwick Pond and Hoxsie , also Warwick Land Trust ("Warwick Land Trust"). Deponent and his family reside at 107 Fairway Lane approximately 300 feet from the property at issue ("Lakeside"). All of the facts herein after stated are, unless otherwise indicated, within deponent's personal knowledge. Plaintiffs' supplemental answers to CF S interrogatories filed January 25, 1988 (60 page including the appendix) and plaintiffs' amended verified complaint, filed March 31, 1988 (30 page including exhibits) - both verified by deponent - are incorporated by reference.

Early Opposition

Since November, 1986 when the Warwick community first became aware of defendant Children's Friend & Service's ("CF&S") efforts to

exploit and to develop the Lakeside property and thus change its use from community enjoyment to private profit, deponent and other Warwick residents organized in opposition. (The Warwick Land Trust, including our prior label, "Friends of Warwick Pond and Hoxsie," was incorporated in April, 1987.) CF&S' initial proposal to sell and use the Lakeside property for apartments was rejected following a November, 1986 public hearing. Nine hundred residents signed our petitions and two hundred attended in opposition.

Spring 1987

During March/April 1987 the Warwick Land Trust and the general community learned of CF&S' subsequent intentions to sell the Lakeside property to defendant Frank Sherry to construct 64 houses thereon. Our efforts to communicate with CF&S and its directors - even to learn their identities - were frustrated. Finally, during late May/early June we learned that CF&S' "price" was $900,000.00. The Warwick Land Trust met with a representative of Governor DiPrete. We were told

that the required funds were and would be made available. This information was passed on to CF&S as confirmed by a series of telephone conservations between or among CF&S' executive director, its real estate counsel, Warwick Land Trust's corporate counsel and me, as Warwick Land Trust president. In summary, the Land Trust was told that it was "too late" and that the property would be transferred on June 12, unidentified title problems having been "cured".

(The availability of sufficient funds was again confirmed in September 1987, when (a) the R.I. Department of Environmental Management approved $720,000.00 in matching grants to the Warwick Land Trust and the City of Warwick and (b) the R.I. Heritage Preservation Commission authorized a $250,000.00 loan commitment to acquire the Lakeside property.)

The aforementioned "title problems", also suggested by other sources, caused the Land Trust - on or about, June 5, - to examine the April, 1951 recorded deed from Family Service to CF&S and

the Court's February 16, 1951 cy pres decree authorizing the transfer. See copy annexed to our amended verified complaint. The Land Trust was then told that an R & F representative had also expressed interest in the Court's file. As indicated in our accompanying memorandum, depositions of the aforesaid CF&S and R&F representatives are outstanding.

RI Attorney General Communications

During June/July 1987, after the purported June 12, 1987 closing(s), the Warwick Land Trust, directly and indirectly contacted the Attorney General to ascertain whether his office would help. Communications were cordial, yet uncertain. Clearly, the Attorney General and his office had not been notified of any intention to transfer the Lakeside property prior to the aforementioned June 12, 1987 "closing (s)". However, when it appeared even as late as August 1 that the Department would not commence suit, the Warwick Land Trust and the individual co-plaintiffs (officers and directors active in Land Trust affairs) instructed counsel

to proceed. As indicated, the Attorney General was named a party for the sole purpose of ensuring jurisdiction (Initial complaint par. 7; amended verified complaint, par.11) He and his office were so advised on August 3. Subsequently, at the CF&S oral examination of co-plaintiff Eileen S. Naughton on November 10, 1987- which deponent attended - Assistant Attorney General Murray pointedly noted that his office had not been notified of the June 12, 1987 transactions. The transcript so shows. (Id.151)

August 24, 1987 Hearing

Deponent also attended the Court's August 24 hearing on CF&S' prior motion to dismiss this action. Deponent calls upon CF&S to file the complete, not simply a partial copy of the transcript. After hearing both sides, Judge Bulman upheld the sufficiency of our initial complaint, our accompanying right to proceed and, as CF&S' partial transcript confirms, the plaintiffs' right to "get their licks in". To me this meant full pre-trial discovery. (Indeed, our litigation

counsel, Mr. Stitt, reported to me following a later hearing that fall that the Court made reference to the aforementioned August 24 ruling in upholding the plaintiffs' notice to depose CF&S by its president (the affiant Aitken) and its aforementioned executive director, Mr. DiChirico).

November 10, 1987 Naughton Deposition

As stated above, deponent attended CF&S' oral examination of Mrs. Naughton last November 10. Again CF&S seeks to misconstrue proceedings by resorting to just an excerpt. Deponent calls upon CF&S to file the complete Naughton transcript. It will confirm that while the individual plaintiffs do not claim personal title to the Lakeside property, the Court in exercise of its equitable and charitable jurisdiction could well divest CF&S of title and transfer the property to some other entity which would be prepared to hold and use the property consistent with the Court's 1951 decree and the original donors' charitable intentions. (Cf. plaintiffs' supplemental answers to CF&S interrogatories (par 25), which Mrs. Naughton and

her co-plaintiffs verified January 24, 1988.4

The highlight of Mrs. Naughton's testimony, which CF&S does not mention, was her recital of the historical research of the initial donee's corporate records which she, co-plaintiff Jeanne M. Foster and Maureen Callahan had just conducted at Family Service, Inc.. Copies of a number of th records found, identified by Mrs. Naughton and actually self-authenticating, were produced and explained at that time. Those documents and other were appended to the aforementioned January 1988 supplemental answers to interrogatories. Such documents, which the defendants have not dared mention on this motion, form the primary basis fo paragraphs 17-41 of the plaintiffs' March 31, amended verified complaint.

The plaintiffs' research is still going on. For example, Dr. Faunce, who temporarily accepted title to the first donated parcel in 1912, as "trustee" was the charitable donee's president (not just Brown University's). Cf. amended verifie complaint, par. 18. The funds donated to acquire

an adjoining parcel in 1916 appear, in large measure, to have come from Henry D. Sharpe who succeeded Dr.Faunce as president of the Providence Society for Organizing Charity (subsequently, Family Welfare Society and later Family Service, Inc.) in 1913. Cf. amended verified complaint, par.21. The document January 18, 1936 statement by the Society's then Honorary Counsel, George H. Huddy, Jr., Esq., that "in view of the conditions under which (the Lakeside) property was purchased the ...Society was obligated to continue to hold title as trustee for those purposes for which the property was placed in its name ...", is more than an isolated opinion and recollection. Cf. amended verified complaint , pars. 20,27 (b)(d) and (f). It now appears that in 1936, when the Tuberculosis League's lease "came up for renewal" (Cf. verified complaint pars. 16, 22-25, 27 (c)(d) and (e), (f) and (g) and 28-34) the League asked for the title to Lakeside, but, "after much thought and discussion", the Society heeding Mr. Huddy's counsel decided not to transfer title to the

League but to renew its lease for ten more years. (Steadily...Through the Years - the Family Welfar Society of Providence, 1942).

In addition to the community support for Lakeside programs, mentioned in their amended verified complaint, (pars. 35-37) the plaintiffs have now learned that the State of Rhode Island was a substantial contributor - $100,000.00 in 1975 and $51,000.00 in 1977. (Providence Journal articles June 2 and June 15, 1977).

Class Action Purpose

As indicated above and in the accompanying memorandum of law, the plaintiffs' authority to pursue this suit was confirmed by the Court's August 24 rulings. Deponent submits that that decision should not be disturbed. The class or classes we represent include (a) some 2,000 persons, including deponent and co-plaintiffs Foster and Kathleen Preiss, who reside west of Warwick Avenue near Warwick Pond and Lakeside; (b some 87,000 additional Warwick residents - including the co-plaintiff Naughton and (c) some

900,000 other Rhode Islanders, the entire state having an interest in preserving open land. (Amended verified complaint, pars. 1-5, 26, 35-37, 43, 61-64, 73-78; plaintiffs supplemental answers to the interrogatories, pars. 1-4, 5 (pp.9-11), 12, 14, 15, 18, 22, 25, and 28). The recreational environmental and home value damage which we seek to prevent is real and documented. See, especially, our supplemental answers to interrogatory No. 18 and (a) the annexed February 20, 1987 Audubon Society letter signed by its distinguished executive director Alfred L. Hawkes and (b) the annexed October 29, 1987 East Greenwich Pendulum article quoting Mr. Hawkes and that community's respected town planner, Richard Youngken.

More importantly, the plaintiffs have justified the Court's August 24 ruling by raising money , performing investigation and otherwise conducting this suit diligently. (Several hundred persons, including a Toronto, Canada resident, have responded to our litigation fund raising

appeals and more are being planned.) More investigation, including pending discovery motions, is required. Such discovery applications (also incorporated herein) are also pending on the May 23 calendar and need no further support or comment by this deponent .

Conclusion

For reasons stated above and in counsel's accompanying memorandum, CF&S' dismissal motion should be denied.

s/Paul Huling

Paul Huling

Subscribed and sworn to before me this 19th day of May 1988 in the City of Pawtucket, County of Providence and State of Rhode Island.

s/ Susan Ferranti

Susan Ferranti
My commission expires
June 30, 1991

AUDUBON SOCIETY
Of RHODE ISLAND

12 Sanderson Road
Smithfield, RI 02917

Alfred L. Hawkes
Executive Director

February 20, 1987

Friends of Warwick Pond and Hoxsie
c/o Jean Foster
31 Lakecrest Drive
Warwick, RI

Dear Friends:

This letter is to convey the strong support of the Audubon Society of Rhode Island for your efforts to preserve the Children's Friend and Service land on Warwick Pond by purchasing it from that organization.

I have visited the property personally and concur fully it is not only exceedingly valuable open space but is also high value wildlife land in addition. It is diverse in vegetation cover, exceedingly wet in places, contains a mature stand of pine and a second and younger pine stand of almost equal size. A principal value as open space and for wildlife is the shoreline protected by the property on Warwick Pond. There is some field habitat as well as a mature oak/hickory stand and red-maple swamp in the wet areas.

Low-intensity recreational and educational use of this property would not significantly impinge on its wildlife values, but the emphasis must be on "low-intensity".

The value of this land is, at present, further enhanced by the nearly abutting undeveloped state

and private wetlands immediately across Lake Shore Drive from the subject land. The wildlife corridor created by this combination is of great significance in such an intensely developed area.

As a former resident of the Hoxsie area, I can personally attest to the desperate need for protecting this last remnant of open land in this now urban neighborhood. Its relatively large size, proximity to the pond and other protected open space, unquestionable wildlife value, undisturbed nature, and recreational and educational potential make its value to the entire community of Warwick greatest in its present undeveloped state. There is no possibility that the tax return to the City from development of this land could in any way be adequate recompense for the loss of open space and other values to the City of Warwick as a whole.

Again, we strongly endorse your efforts, offer our support wherever possible, and congradulate you on

the lively and well-organized effort you are sustaining.

Very truly yours,

s/ Alfred L. Hawkes

Executive Director

ALH:mm

Serving Rhode Island Since 1897

Excerpt CF&S August 17, 1987 Memorandum

In the instant case, the Attorney General has not seen fit to institute an action for the enforcement of this CF&S trust.* Moreover, the administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction.

Plaintiffs are not co-trustees of the CF&S trust,* nor are they specifically beneficiaries under the trust.* Plaintiffs have no special interest in the land, no more so than any neighborhood resident, any resident of the City of Warwick, nor for that matter, any more so than each and every Rhode Islander. If Plaintiffs had indeed benefited from CF&S`s permitting them to use the CF&S property for Plaintiffs' recreational activities, this benefit, however, would have accrued only as a consequence of Plaintiffs being mere members of the general public. They are not the specific beneficiaries of the CF&S trust,* and therefore they hold no legally protected interest in maintaining the CF&S trust.* Thus, under the

*EMPHASIS ADDED

clear application of well-settled law in this situation, Plaintiffs suit should be dismissed, with prejudice, for want of standing.

C. Statutory Provisions

R.I.G.L. Section 18-4-13 governs the statutory standing for parties to proceedings involving the administration of trusts. This section provides standing to "[a]ny persons who have any vested, contingent, executory or future right, title, interest or estate in or to any part of said trust property, and any persons who might be any future contingency have any such right, title, interest, or estate." It is readily gleaned from the instant Complaint that Plaintiffs have neither alleged nor demonstrated sufficient right, title, interest or estate to pass the threshold test for standing found in R.I.G.L. Section 18-4-13. Plaintiffs have no legal or equitable interest in the CF&S trust property* which would entitle them to maintain or join an action, pursuant to R.I.G.L. Section 18-4-10, concerning the management of the CF&S trust property.*

*EMPHASIS ADDED

RE-SCHEDULED MOTION TO COMPEL PRODUCTION FROM CHILDREN'S FRIEND AND SERVICE

Having served their amended verified complaint upon all additional parties and said additional parties having filed answers thereto, as provided in the Court's March 28, 1988 order (decretal paragraph 3), plaintiffs renew their annexed March 8, 1988 motion for an order compelling defendant Sherry (sic) to produce documents therein specified and granting other just relief.

Plaintiffs,
By their Attorneys,

PEARLMAN, VOGEL & VIOLET

Robert S. Stitt, Esq.
P.O. Drawer 907
Providence, Ri 02940
(401) 726-6200

Dated: April 29, 1988

PLAINTIFFS' MOTION TO COMPEL PRODUCTION

FROM DEFENDANT,

CHILDREN' S FRIEND & SERVICE, INC.

("CF&S")

Plaintiffs' move for an order compelling defendant CF&S to produce complete or alternatively less expurgated copies of 1950-1952 CF&S board meetings as required by December 14, 1987 Court ruling and subsequent order. Plaintiffs' motion should be granted for the following reasons:

1. Such contemporaneous (1950-1952) CF&S board meeting minutes are within the scope of items 6, 7, and 8 of the plaintiffs' amended document request, dated November 14, 1987 and the Court's December 14, 1987 ruling and subsequent order. See copies annexed hereto.

2. The foregoing ruling and order contained no provision (a) limiting defendant CF&S' compliance or (b) providing for delivery of expurgated copies. Id.

3. By letter dated January 25, 1988, in purported compliance with the aforesaid discovery, CF&S delivered expurgated copies of eleven CF&S 1950-1952 board meeting minutes and one expurgated copy of an October 19, 1950 letter from the Chairman of the CF&S Lakeside Committee to the Chairman of Providence Council of Community Services. See tendered photocopies annexed hereto.

4. Without impugning in any way the integrity of the deletor, plaintiffs' have informed CF &S that such expurgated documents cannot be accepted because:

(a) differing opinions as what is confidential and priviledged from disclosure or even relevancy; e.g. see annexed comparison of CF&S expurgated copy, of Chairman Smith's October 19, 1950 letter with the complete copy voluntarily produced by Family Service and appended to Plaintiffs' January 25 supplemental answer to CF&S interrogatories, showing the clear linkage between (a) the real property which CF&S obtained through Family Service's 1951 Superior Court cy pres proceeding and endowment funds which CF&S obtained from the Providence Tuberculosis League 1951 Superior Court cy pres proceeding.

(b) confidentiality of (1) adoption matters and (2) personnel matters can be served by simply blocking out names, addresses, positions and

salaries;

(c) thirty-five year old documents - 50, 75 in some instances 90% deleted - are of very limited use in litigation and would create unnecessary problems at trial;

(d) the rights of all persons could be protected by in camera examination and ruling.

Plaintiffs'

By their Attorney:

s/Robert S. Stitt

Robert S. Stitt

P. O.Drawer 9007

Providence, RI 02940

HEARING NOTICE

The within motion is noticed for hearing on March 14, 1988.

The regular board meeting of the Children's Friend and Service was held on January 24th, 1951 in the Board of Directors' Room of the Rhode Island Hospital Trust Company. The meeting was called to order by the President, Mr. Gurney Edwards, and those present included Mrs. Nella Lane Gardner, Executive Director, Miss Natalie Dunbar, Director of Casework, and the following board members: -

Mrs. DeForest W. Abel
Mrs. John W. Baker
Mrs. J. Murray Beardsley
Mrs. Edward S. Brackett,
Mrs. James P. Brown
Mr. Herbert B. Carkin
Mrs. Morgan Cutts
Mrs. Allen H. Chatterton
Mr. Gurney Edward
Mr. Carl W. Haffenreffer
Mrs. Ralph S. Hamilton
Judge Edward L. Leahy
Mrs. Stanley Livingston, Jr.
Mr. Charles B. McGowan
Mr. Malcolm E. Read
Mrs. Roger W. Shattuck
Mrs. Erockholist Smith
Mrs. Chandler E. Swallow
Mrs. Henry E. Utter

*Remainder of Page 1 blacked out.

Mr. Edwards reported that Family Service had taken action on Lakeside. The legal steps are in process and it is expected that the transfer of property will be completed about February 15, 1951. Mrs. Gardner said that the staff was ready to move and a caseworker assigned to Lakeside. $20,000 has been set aside by the Community Fund for the continued operation of Lakeside this year. The housing committee will meet again promptly.

*Remainder of Page 2 blacked out.

*Beginning of Page 3 blacked out.

There being no further business the meeting adjourned at twelve noon.

Respectfully submitted,

Katharine K. Cutts
Secretary

The regular meeting of the Board of Directors of the Children's Friend and Service was held on February 28, 1951 at 11 A.M. In the Directors' Room of the Rhode Island Hospital Trust Company. The meeting was brought to order by Mr. McGowan, Vice-President, and those present included, Mrs. Nelle Lane Gardner, Executive Director, Miss Natalie Dunbar, Director of Casework, and the following members:

Mr. DeForest W. Abel
Mrs. John W. Baker
Mrs. J. Murray Beardsley
Mrs. James P. Brown
Mr. Pasquale J. Capuano
Mrs. Allen H. Chatterton
Mrs. Wiliam Davis Cole
Mrs. Morgan Cutts
Mrs. Russell J. Dayton
Mr. Pardon R. Kenney
Mrs. William T. Lees
Mrs. Stanley Livingston, Jr.
Mrs. W. Kinsley Low
Mr. E. John Lownes, Jr.
Mr. Charles S. McGowan
Mrs. F. Edward Pollard
Mrs. Roger W. Shattuck
Mr. Clayton D. Sheldon
Mrs. Henry Van Hoesen
Mr. James N. Williams

*Center half Page 1 blacked out.

Mrs. Gardner reported that the Lakeside property had been transfered to this organization in court on February 16, 1951. The final deed has not yet been furnished by Superior Court. In the interim, meetings have been arranged with the T.B. League for consultation. We have a caseworker ready and we expect to take over the operation of Lakeside on April 1st. The report of progress has been given to the Lion's Club who are interested in helping. It is planned for the present to use the buildings as they are.

*Entire Page 2 & Upper third of Page 3 is blacked out.

There being no further business the meeting was adjourned.

Respectfully submitted,

s/ Katherine K. Cutts

(Mrs.) Katherine K. Cutts
Secretary

Excerpt CF&S April 26, 1988 Memorandum

In the instant case, the Attorney General has not seen fit to institute an action for the enforcement of the CF&S trust. Moreover, the administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction.

Plaintiffs are not co-trustees of any alleged CF&S trust,* nor are they specifically beneficiaries under any alleged trust.* Plaintiffs have no special interest in the land, no more so than any neighborhood resident, any resident of the City of Warwick, nor for that matter, any more so than each and every Rhode Islander. If plaintiffs had indeed benefited from CF&S' permitting them to use the CF&S property for plaintiffs' recreational activities, this benefit, however, would have accrued only as a consequence of plaintiffs being mere members of the general public and gave them no rights. They are not the

*EMPHASIS ADDED

specific beneficiaries of any alleged CF&S trust,* and therefore they hold no legally protected interest in maintaining the alleged CF&S trust.* Thus, under the clear application of well-settled law in this situation, plaintiffs suit should be dismissed, with prejudice, for want of standing.

C. Statutory Provisions

Section 18-4-13 R.I.G.L. (1981 reenactment) governs the statutory standing for parties to proceedings involving the administration of trusts. This section provides standing to "[a]ny persons who have any vested, contingent, executory or future right, title, interest or estate in or to any part of said trust property, and any persons who might by any future contingency have any such right, titlle, interest, or estate." It is readily gleaned from the instant Complaint that plaintiffs have neither alleged nor demonstrated sufficient right, title, interest or estate to pass the threshold test for standing found in section 18-4-13 R.I.G.L. (1981 reenactment).

*EMPHASIS ADDED

plaintiffs have no legal or equitable interst in any alleged CF&S trust* property which would entitle them to maintain or join an action, pursuant to section 18-4-1Ø R.I.G.L. (1981 reenactment).

*EMPHASIS ADDED

March 16, 1989

Supreme Court, State of Rhode Island
Providence, County Courthouse
250 Benefit Street
Providence, RI 02903

RE: Friends of Warwick Pond, et al
VS: Children's Friend and Services, Inc. et al
SUPREME COURT NO.: 88-426-A
C.A. No: KC-811
Warwick Lis Pendens Filed August 20, 1987

Dear Sirs:

We acknowledge receipt this morning of the Court's March 13, 1989 order denying the plaintiffs' February 28 petition for reargument. We advise the Court and, by copy of this letter, all others interested or concerned, that the plaintiffs will now petition the United States Supreme Court for a writ of certiorari on grounds inter alia, that the

plaintiffs have been denied equal protection of the law and due process.

Respectfully,

PEARLMAN, VOGEL & VIOLET

s/Robert S. Stitt

_____

Robert S. Stitt

RSS/wt

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-31

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE ALSO WARWICK LAND TRUST, PAUL HULING JEANNE M. FOSTER, EILEEN NAUGHTON AND KATHLEEN PREISS,

PETITIONERS,

v.

CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, RHODE ISLAND CENTRAL CREDIT UNION AND JOHN DOES, ONE THROUGH FIVE,

RESPONDENTS,

AND JAMES O'NEIL, IN HIS CAPACITY AS RHODE ISLAND ATTORNEY GENERAL,

ADDITIONAL PARTY - RESPONDENT.

RESPONDENTS' R & F ASSOCIATES AND RHODE ISLAND CENTRAL CREDIT UNION'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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I.

QUESTIONS PRESENTED

I. Whether This Petition Should Be Denied For Failure To Raise A Federal Question Or Constitutional Issue Before The State Court.

II. Whether the Rhode Island Supreme Court Properly Sustained The Summary Judgment Entered For The Respondents-Defendants In The Superior Court.

III. Whether The Rhode Island Supreme Court Properly Sustained The Superior Court Judgment Dismissing This Matter.

IV. Whether Petitioners Should Be Sanctioned For Filing A Frivolous Petition.

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
ALSO WARWICK LAND TRUST, PAUL HULING
JEANNE M. FOSTER, EILEEN NAUGHTON AND
KATHLEEN PREISS,
PETITIONERS,

v.

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION AND
JOHN DOES, ONE THROUGH FIVE,
RESPONDENTS,

AND JAMES O'NEIL, IN HIS CAPACITY AS
RHODE ISLAND ATTORNEY GENERAL,
ADDITIONAL PARTY - RESPONDENT.

RESPONDENTS' R & F ASSOCIATES AND RHODE ISLAND CENTRAL CREDIT UNION'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

Citation to Opinion Below

The decision and order of the Rhode Island Supreme Court (unreported) is reproduced in the respondents' appendix at pages 1-3. The decision and judgment of the Rhode Island Superior Court (also unreported) is reproduced at pages 4-5 of respondents' appendix.

The Rhode Island Supreme Court denied Petitioners' appeal in *Friends of Warwick Pond* v. *Children's Friend and Service, Inc.*, C.A. No. 88-426, on February 23, 1989 and also denied petition for reargument on March 13, 1989.

Jurisdiction

Respondents assert that Petitioners have failed to raise a federal question or constitutional issue as basis for their Writ of Certiorari and as such, they are improperly before this Court.

Statement of the Case

This is not a class action suit as represented in petitioner's brief. This matter rests on a Summary Judgment granted to Respondents by the Rhode Island Courts for lack of standing by Petitioners, as well as a lack of subject matter.

Petitioners attempted to challenge respondent's deeds by utilizing a *cy pres* application over a non trust. Respondent's title in the entire claim evidences transfers in fee simple without restriction. (R.A. 8-13). The Rhode Island Superior Court Judge granted Summary Judgment and specifically held that there was no *cy pres* application warranted (R.A. 4-5). The Rhode Island Supreme Court directed in a show cause order for dismissal (R.A. 6-7) that the parties answer three questions as to why the appeal should not be summarily decided. Petitioners and Respondents submitted briefs and argued to the Supreme Court. The Court concluded that cause has not been established and that Petitioners had no standing to bring the complaint and thus, denied the appeal and affirmed the Superior Court Judgment. The title therefore is good.

It has been observed:

> "Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket?"[1]

At the commencement of suit, Petitioners filed a *lis pendens* with the Recorder of Deeds of the City of Warwick which stayed on record for approximately 18 months. Respondents were prevented from developing and utilizing their property due to the cloud on title which was created. When the Rhode Island Supreme Court rendered its opinion denying Petitioners' appeal, Respondents made request for the removal of the *lis pendens* and Petitioners' attorney refused, forcing Respondents to apply to the Superior Court of the State of Rhode Island for removal of the *lis pendens* — which was granted.

It should be further observed that Petitioners removed two Respondents from this case, namely St. Timothy's Church Corporation (Warwick) and Woloohojian Realty Corporation, by filing Petitioners' Rule 19.6 Notice. (R.A. 14). It is interesting to note that the two designated Respondents hold title to their respective property out of the same chain of title involving the subject property — St. Timothy's Corporation acquiring from Respondent Children's Friend and Service, Inc., after Children's Friend and Service, Inc., acquired the larger tract of land in 1951. Woloohojian Realty Corporation acquired its parcel from St. Timothy's Church Corporation on a subdivision.

Petitioners failed to represent this information in the body of their brief, rather they informed the Court through an independent Notice on the basis of No Interest. Respondents contend that Petitioners' position of acquiescence in the title to these two Respondents proves validity of title in Respondent Children's Friend and Service, Inc., as well as R&F Associates.

---

[1] Abraham Lincoln — Nicolay-Hay II p. 140-143.

Reasons For Denying the Writ of Certiorari

Petitioners alleged that they brought this action to protect their homes, their neighborhood and their environment, however, they failed to establish that they had any standing whatsoever to bring this action. There is nothing within the framework of this petition to establish a constitutional issue in light of their allegations. The Rhode Island Supreme Court held that there was a lack of standing by the Petitioners to bring this action and the question was squarely raised by the Court that Petitioners had to establish authority giving them a cause of action against the Respondents. Petitioners ignored this responsibility — by completely side-stepping that issue. It is all well, fine, and good to reference Tom Wiker as to environmental struggles, whatever connection that has to the question. The short answer is that they are complete interlopers with respect to the title involved.

The issues here are focused solely on the responsibility of the Rhode Island Supreme Court to establish its own procedure. Petitioners are dealing with "mirrors" by alleging that they demonstrated in spades the "concrete adversity" that sharpens issues, the very objective which Rhode Island's "injury in fact" test is designed to ensure. Rhode Island Superior Court gave the plaintiffs ample opportunity to demonstrate that they had standing which they failed to do, together with the fact that they misrepresented to the court that the deeds in question were subject to restriction or trust application. The Superior Court specifically held that the deeds in question conveyed absolute title in fee simple, and as such, there being no trust application or restrictive hold on the use of the title, there was no need to use a *cy pres* application to transfer title. The Rhode Island Supreme Court sustained this position and further held as a matter of law that Petitioners lacked standing to bring a cause of action against the defendants. This order was very clear and direct. Petitioners have not been denied due process or equal protection in that Petitioners have no claim to this

title under any circumstances whatsoever and in fact, the sole purpose for bringing this action was to interfere with the respondent, R&F Associates, right to hold title or to develop this land in accordance with the accepted zoning application of the City of Warwick. Petitioners failed to raise any federal or constitutional issue at any stage before the Rhode Island Courts.

It should be pointed out that the Petitioners have abused the court system by interfering with the respondent, R&F Associates right to develop their own land and have peaceful enjoyment of title. Petitioners immediately placed a *lis pendens* upon commencing an action in 1987 and they refused to remove that cloud on title even after judgment of the Rhode Island Supreme Court was entered in February of 1989. Petitioners have caused the Respondents to expend large sums of money to defend this action, as well as caused delay in development, accrual of finance charges and interest expenses by holding the mortgage for an extended period of time without the opportunity to sub-divide and sell. Interestingly, the Petitioners interfered with defendant's commercial development during that period of time when development was at its peak and it is no longer in such demand.

Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure provide a mechanism to expedite court proceedings for the purposes of entering judgment for the prevailing party when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Rule 56(c)). Our rule also provides that "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Petitioners ask for fair play in their petition, however, when one analyzes the fundamental fairness of what is suggested, Petitioners have failed to establish as a matter of law, that they have a right to sue. Petitioners were requested on repeated occasions both in the Superior Court and in the Rhode Island

Supreme Court to establish their connection to the title, as it appears that they are total strangers to the title, being neither buyer nor a legally interested party. The underlying fact is that the Petitioners had no connection whatsoever either to the benefit through Children's Friend and Service or as a matter of title history to be in a position to contest this title. Their argument to apply the *cy pres* doctrine had no bearing on this particular matter because the deed was never established as anything other than a title held in fee simple by Respondents, Children's Friend and Service, to use for their sole purposes. Children's Friend and Service had made the decision to sell the property in order to liquidate that asset. The resultant funds are to be used consistently, with their overall purposes. Petitioners allege on page 12 of their brief that they have survived a threshold motion challenging their right to protect "Lakeside" (subject property) when, in fact, this is not so. Plaintiffs misconstrue the procedure that had developed up to the granting summary judgment pursuant to Rule 56. Petitioners had not survived the right to sue by virtue of prevailing on a right to discovery, rather, they had failed to establish in any way that they had standing to bring this action. Petitioners knew full well that they lacked that necessary standing as they persistently avoided responding to that question by the courts. Petitioners further tried to defer and deflect the standing issue by creating a scenario that there was an issue concerning title held in trust when, as an undisputed matter of fact, the respondent, Children's Friend and Service, had received this property without any restriction whatsoever by bargain and sale deeds. No trust or other restrictive transfer is indicated on the face of the deeds. What they are clearly attempting to do is to avoid this inconvenient fact. A camouflage, their basic posture, is to prevent a development of a piece of property which they contend will have a serious monetary, recreational and environmental damage to their home and community yet, they have failed to establish that as a matter of law they have a right of any nature to access to that property. It is patently clear this is not any specie of public land.

I. WHETHER THIS PETITION SHOULD BE DENIED FOR FAILURE TO RAISE A FEDERAL QUESTION OR CONSTITUTIONAL ISSUE BEFORE THE STATE COURT.

It is a rule of the United States Supreme Court that jurisdiction would not be granted if a federal question or a constitutional issue were not raised in the State Court. In *Webb* v. *Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) this Court held with regard to a full faith and credit issue that this issue has not been preserved in the State Court. The court stated:

> "Because this case comes to this court from state court, the relevant jurisdictional statute is 28 U.S.C. @ 1257. As applied to the circumstances of this case, the statute requires that in the state courts petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this court enforce. 28 U.S.C. @ 1257(3). Similarly our Rule 21.1 (h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."
> *Webb* v. *Webb*, supra, at page 495.

The court noted in *Webb* v. *Webb*, supra, the lack of a federal question mentioned in the lower court or expressly passed on. The court emphatically stated, "It is a long-settled rule that the jurisdiction of this court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. *Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897)." *Webb*

v. *Webb*, supra, at page 496-497. This same principle was followed in *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). The Court in *Webb* v. *Webb*, supra, at page 499-500 points out that:

> "... this principal of comity requires 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'"

The Court in *Webb* v. *Webb*, supra, noted the point that the states should have the "opportunity to pass upon and correct" alleged violations as well as the state courts exercising their authority for adjudicating the issue.

Petitioners here have failed to identify any federal question or constitutional issue argued in the State Court. Rather, they attempt to "federalize" state rules of procedure in order to create their forum. Rhode Island rules of Civil Procedure are not the Federal Rules of Civil Procedure and this is an insult to the Court.

II. Whether The Rhode Island Supreme Court Properly Sustained The Summary Judgment Entered For The Respondents-Defendants In The Superior Court.

Rule 56(c) of the Rhode Island Rules of Civil Procedure specifically states in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The fundamental issue that the Rhode Island Supreme Court addressed is as a matter of law, what standing and right did the appellants have to bring this suit? The court pointed out that only the Attorney General of the State of Rhode Island has such standing by statute (R.I.G.L. 18-9-5). The Attorney General has indicated that he finds no fault in the sale of the subject realty by Children's Friend and Service.

Petitioners seek to place themselves in a posture of the *Sierra Club* v. *Morton, Secretary of the Interior*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 as raised on page 14 of Petitioners' brief. Petitioners allege that they brought suit to prevent serious monetary, recreational and environmental damage to their homes and community, however, they overlook one important fact which is that the land in question has no relationship to them. The said land is not public or municipal property, or property dedicated for public use. Rather, the land in question is privately held property in fee simple that happened to be owned by a non-profit corporation. In *Sierra Club* v. *Morton*, supra, the subject land was used almost exclusively for recreational purposes and there was a move to create a site for recreational development including skiing facilities and other like activities. Petitioners attempted to block the project by involving a judicial-review provision of the Administrative Procedures Act, 5 U.S.C. 701, et seq. The District Court granted a preliminary injunction and the Ninth Circuit reversed that decision with the observation that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distressful to them". The court went on to note "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under congressional and constitutional authority." The Ninth Circuit specifically held that the Sierra Club has not made an

adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The United States Supreme Court granted certiorari to review the questions of federal law. The Supreme Court noted in *Sierra Club* v. *Morton*, that:

> "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U.S. 186, 204, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 101.

In addressing the issue of "injury in fact" tests in *Sierra Club* v. *Morton*, the Supreme Court specifically pointed out that the test "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." The court further went on to state:

> "But a mere "interest in a problem," no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, it is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special

> interest" organization, however small or short-lived. And if any group with a bone fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so."

The court then noted in *Sierra Club* v. *Morton*, supra, "As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other question presented in the petition, and we intimate no view on the merits of the complaint." The court then affirmed judgment.

In the case of *Berberian* v. *Solomon*, 122 R.I. 259, 405 A.2d 1178 (1979) Rhode Island addressed the issue of "injury in fact". The plaintiffs in *Berberian*, supra, attempted to enjoin payments of state funds to retired members of the Rhode Island General Assembly who were receiving benefits through a pension system. The Court noted that "Although recent United States Supreme Court decisions have liberalized standing requirements to the point of allowing certain suits to protect the public interest, the Court still insists that the representative allege his personal stake in the controversy — his own injury in fact — before he will have standing to assert the broader claims of the public at large." The Rhode Island Supreme Court in *Berberian*, supra. cited *McCarthy* v. *McAloon*, 79 R.I. 55, 83 A.2d 75 (1951) for the following proposition:

> "In this state it was long ago settled that 'Suits for the public should be placed in public and responsible hands' *O'Brien* v. *Board of Aldermen*, 18 R.I. 113, 116. The public officer vested with that authority is the attorney general of the state. Only he may sue to redress a purely public wrong except in those instances where one of the public who is injured has a distinct personal legal interest different from that of the public at large***." *Id.* at 62, 83 A.2d at 78.

The Court went on further in *Berberian*, supra, to note "This court, like the Supreme Court, requires a complaint to contain specific statements from which standing may be inferred."

The Rhode Island Supreme Court in *Matunuck Beach Hotel, Inc.* v. *Sheldon*, 399 A.2d 489 (R.I. 1979) indicated that in order to sustain standing, the party has to show injury and the issue will be between whether there is injury and no injury.

Petitioner has miscalled and misapplied the Rule 56 standard by referencing it as a Federal Rule of Civil Procedure. Citing *Nichola* v. *John Hancock Mutual Life Insurance Company*, 471 A.2d 945 (R.I. 1984) (See petitioner's Petition for Certiorari on page 2). *Nichola*, supra, specifically held "Summary judgment should be granted only if an examination of all the pleadings, affidavits, admissions, answers to interrogatories, and other materials, viewed in the light most favorable to the party opposing the motion, reveals no genuine issue of material fact. Citing *Estate of Bassett* v. *Stone*, R.I., 458 A.2d 1078, 1081 (1983); *Saltzman* v. *Atlantic Realty Co.*, R.I., 434 A.2d 1343, 1345 (1981); *Marandola* v. *Hillcrest Builders, Inc.*, 102 R.I. 46, 49, 227 A.2d 785, 787 (1967) There is no absolute requirement under Rule 56 that the nonmoving party submit an affidavit opposing a motion for summary judgment. *Steinberg* v. *State*, R.I., 427 A.2d 338, 340 (1981). However, when no such opposing affidavit is filed, the nonmoving party may not rest upon the allegations contained in the pleadings alone to establish the existence of a genuine issue of material fact. *Nedder* v. *Rhode Island Hospital Trust National Bank*, R.I., 459 A.2d 960, 962 (1983); *Ardente* v. *Horan*, 117 R.I. 254, 257, 366 A.2d 162, 164 (1976) The nonmoving party has an affirmative duty to set forth specific facts showing that there exists a genuine issue of fact to be decided at trial. *Id.* at 257, 366 A.2d at 164." In *Nichola* v. *John Hancock Mutual Life Insurance Company*, supra, the court specifically found that "Examining the defendants' memorandum in this light, we

find no material, factual issue existed, and summary judgment was properly granted."

In the case of *Blackstone Valley Chamber of Commerce* v. *Public Utilities Commission*, 452 A.2d 931 (R.I. 1982) the Rhode Island Supreme Court pointed out the holding in *Sierra Club* v. *Morton*, supra, by stating "[M]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'***." *Sierra Club* v. *Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636, 645 (1972). The court went on to note that the mere fact that the Petitioners were permitted to intervene before the commission does not entitle it to institute an independent suit to set aside the commission's order in the absence of resulting actual or threatened legal injury to it. The court went on and specifically found that the plaintiffs in this case lacked standing to maintain this action.

Petitioners before the bar in the instant matter, likewise lacked standing in terms of the subject property in question. They have not demonstrated in any allegation, complaint, affidavit or document that they had any right in and to the subject property. Further, there is no allegation demand or claim that there is an interference with or violation of a statutory right by way of zoning or ordinance. This petitioner has filed a frivolous action to the detriment of the Respondents herein.

Petitioners cite several cases that are highly distinguishable from their standing issue, e.g. *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962) (members of the General Assembly of Tennessee challenging size of representation — diluting of voting rights); *Citizens to Preserve Overton Park, Inc. et al* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (municipal public park subject to construction of a right of way); *Logan* v. *Zimmerman Brush Company*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265, (1982) (fair employment practice commission case involving discriminatory

practices with employee); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950) (issue of notice to beneficiaries under trust by publication); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1969) (discrimination case involving refusal to serve food); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed 884 (1954) (issue of segregation and discrimination in public schools); *Bradley* v. *Fisher*, 80 U.S. 335, 20 L.Ed 646 (1871) (exemption of judges from liability to suit for judicial acts); *Stump* v. *Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judicial immunity-standards); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (termination of welfare benefits and eligibility issue); *Greene* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (issue of governmental revocation of security clearance on government contracts).

Petitioners have cited other cases dealing with criminal law principles and issues that do not pertain to the matter at hand and therefore, are not applicable to the question before the court. The simple fact in this case is that Petitioners have failed to establish that they had any right or interest in and to the land in question and as such, they lack standing to bring this matter.

III. Whether The Rhode Island Supreme Court Properly Sustained The Superior Court Judgment Dismissing This Matter.

Petitioners argue that defendant Children's Friend & Service improperly conveyed this property to defendant Frank P. Sherry. Petitioners contend that this title was subject to court review by virtue of *cy pres* application. Petitioners overlook the material fact, which is a basis of law, that title was held by Children's Friend & Service, Inc., in fee simple. The case of *Town of South Kingstown* v. *Wakefield Trust*, 48 R.I. 27, addressed the application of *cy pres*, the court noted, "that

cy pres is utilized when property is given by a donor *in trust for a particular named purpose*, when that purpose fails or can no longer be carried out. There is no need for a *cy pres* application when the corpus can be liquidated to generate a more productive use and therefore, the trust does not fail when the corpus because the funds are being used to satisfy the purpose of the trust." When Children's Friend & Service received the subject property in 1951, and deed specifically conveyed the property in fee simple. The deed does not restrict the use of the property, nor does it create a trust application for its use. Rather, the deed conveys the land in question in fee simple absolute, with the following grant proscribed:

> "To Have and To Hold the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said Children's Friend & Service, its successors and assigns forever to be held by said Children's Friend & Service for its general use and purposes."

The language used is unambiguous, clear and not subject to interpretation.

Petitioners went so far as to allege that the 1951 decision by the Superior Court judge was controlling on every judge thereafter, however, it was noted in *Taveira* v. *Solomon*, 528 A.2d 1105 (R.I. 1987) that:

> "The doctrine of the law of the case, while certainly a practice generally to be followed, should not be used to perpetrate clear error flowing from an early erroneous ruling. See 1B Moore's Federal Practice para. 0.404 [1] at 123-24 (2d ed. 1984) "In some, the doctrine of the law of the case as applied to successive prejudgments of the trial court, is not a rule to perpetrate error and does not require a court to enter an erroneous judgment because the logic of an earlier erroneous ruling would require it. It is

> merely a practice that protects the ability of the court to build to its final judgment by cumulative rulings, with reconsideration or review postponed until after the judgment is entered." *Id.* at 126; See also 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, para. @ 4478 at 790 (1981) ("Justice Holmes noted that law of the case doctrine 'merely expresses the practice of the courts generally to refuse to reopen what has been decided, not at limit to their powers'"). "Most recent decisions suggest that the major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."

The lower court specifically found that there was no material issue of fact in dispute. The court found that the conveyance was done in fee simple without any charitable restrictions imposed upon the holding of the real estate. The Superior Court judge had noted at the time of argument that "whatever act was assumed by the previous action of the court certainly does not establish the existence of a *cy pres* doctrine". This issue was raised and argued before the Supreme Court of the State of Rhode Island and the court specifically stated "After examining the memoranda submitted by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion the gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes". (R.A. 1)

It should be further noted that the State of Rhode Island through the respondent James O'Neil in his capacity as Attorney General for the State of Rhode Island, filed a pre-briefing statement with the Supreme Court of the State of Rhode Island. (R.A. 15-16) The Attorney General in his pre-briefing statement to the Supreme Court stated "The sale of a certain lot or parcel of real estate located in the City of Warwick was

well within the discretion of Children's Friend & Service, Inc., the trustees did not violate their fiduciary duty and acted in the best interest of the trust. Children's Friend & Service, Inc., held this property for its general use and purpose. It was entirely appropriate for the property to be sold and for the proceeds to be applied to the general uses and purposes of the trust." In the case of *Stearns* v. *Newport Hospital*, 27 R.I. 305 (1905) the Rhode Island Supreme Court held that the attorney general is the proper person to represent the public in any judicial inquiry into the conduct of the trustee in administering it and further the mayor of the city was not a proper person to bring suit.

In light of the court finding that the conveyance bringing title into Children's Friend & Service, Inc., was a transfer in fee simple without restriction or reservation within the deed itself, there is no basis for a *cy pres* application. In view of the fact that there is no genuine issue as to any material fact, the Respondents are entitled to judgment as a matter of law.

It is obvious that the Petitioners filed a frivolous action for the sole purposes of interfering with the land development by Respondents R&F Associates. The technique apparently is to hold up the use of the land so that economic pressures force a settlement.

IV. Whether Petitioners Should Be Sanctioned For Filing A Frivolous Petition.

It has been brought to the attention of Respondents that Petitioners requested that the Clerk not docket their petition as discussions are under way for settlement. In addition, Respondents became aware of Petitioners' petition being returned due to error.

It should be noted that Petitioners are in violation of Rule 21 and Rule 29 of this Honorable Court. Respondents contend that they have been prejudiced by the acts of Petitioners in that they have incurred expenses and costs to their detriment

as well as an undue interference with the use of their property because of this litigation.

The Respondents herein respectfully request that sanctions be imposed against Petitioners for willful interference with Respondents' rights to hold the property and to use this property with all enjoyment thereto. This matter presently before the court is completely devoid of any federal issue and Petitioners are making absolute misrepresentations as to Rhode Island adopting federal standards/access test or adopting Rhode Island (Federal) Rules of Civil Procedure. This is nothing but a masquerade to cover an improper foundation to bring this matter before this Honorable Court.

Conclusion

Petitioner's application for a Writ of Certiorari should be denied. The judgment of the Rhode Island Supreme Court should be sustained and this Honorable Court should impose sanctions on Petitioners for undue expenses incurred by Respondents.

Respectfully submitted,

JOEL D. LANDRY, ESQ.
Counsel of Record

LEO T. CONNORS, ESQ.
CONNORS & KILGUSS
56 Pine Street
Providence, RI 02903
(401) 751-3900
Attorneys for Respondents

Providence, Rhode Island
July 10, 1989

APPENDIX

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
NO. 88-426-APPEAL.

PROVIDENCE SC

FRIENDS OF WARWICK POND ET AL.,
v.
CHILDREN'S FRIEND AND
SERVICE ET AL.

O R D E R

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants, Children's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of *cy pres* the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the *cy pres* doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda submitted by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior Court is affirmed and the papers of the case are remanded to the Superior Court.

Entered as an Order of this Court this 23rd day of February 1989.

By Order,

/s/ ILLEGIBLE

MATTHEW J. SMITH
Clerk

Justice Kelleher did not participate.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
No. 88-426-A.

PROVIDENCE SC

FRIENDS OF WARWICK POND
ET AL,
v.
CHILDREN'S FRIEND
AND SERVICE, ET AL.

ORDER

The petition to reargue is denied.

Justice Kelleher did not participate.

Entered as an Order of this Court this 13th day of March 1989.

By Order,

/s/ ILLEGIBLE
MATTHEW J. SMITH
Clerk

State of Rhode Island
Kent, SC.

Superior Court
KC 87-811

WARWICK LAND TRUST, INC.,
PAUL HULING, JEANNE M. FOSTER,
EILEEN NAUGHTON AND KATHLEEN PREISS,
v.
CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION
AND JOHN DOES, ONE THROUGH FIVE,
v.
AND JAMES O'NEIL, IN HIS CAPACITY AS
RHODE ISLAND ATTORNEY GENERAL, AND
SAINT TIMOTHY'S CHURCH CORPORATION,
WARWICK AND WOLOOHOJIAN REALTY CORP.

JUDGMENT

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the *cy pres* doctrine of law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance with Rule 54(b) R.C.P., Judgment for the defendants, Children's Friend and Service, Inc., and R&F Associates on their Motions for Summary Judgment will enter

upon the entry of this Judgment, the Court having determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 1st day of July, 1988.

Per Order,

/s/ ANTHONY PICCIRELLI
ANTHONY PICCIRELLI
Deputy Clerk

Enter:
/s/ BOURCIER, J.
BOURCIER, J.
JUSTICE
DATED: JULY 1, 1988

FILED 1988 JULY 1, 10:11 A.M.
KENT SUPERIOR COURT
ERNEST W. REPOSA, Clerk

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
NO. 88-426-APPEAL.

PROVIDENCE SC

FRIENDS OF WARWICK POND ET AL,
v.
CHILDREN'S FRIEND AND
SERVICE ET AL.

ORDER

This case came before a single justice of this court for a pre-briefing conference in accordance with Rule 16(h) of the Rules of Appellate Procedure. The plaintiffs appeal from a summary judgment entered in the Superior Court in favor of the defendants.

After dismissing the issues with counsel and examining the pre-briefing statements filed by the parties, the justice enters the following order.

1. All parties are directed to appear before this court or a hearing panel thereof on a date to be selected in order to show cause why the issues raised by this appeal should not be summarily decided. These issues include without limiting the generality of the foregoing;
   (a) whether a question of fact exists which should have precluded the entry of summary judgment,
   (b) whether the trial justice erred as a matter of law in granting summary judgment even if no question of fact was disclosed on the record,
   (c) whether the plaintiffs had standing to challenge the conveyances,

(d) whether issues presented by the parties have been preserved for appellate review.

2. The plaintiffs may file a supplemental memorandum not exceeding fifteen (15) pages in length on or before January 16, 1989. Thereafter, defendants may file supplemental memoranda not exceeding fifteen (15) pages in length on or before February 7, 1989. Defendants may file separate memoranda or may join in one or more memoranda as they see fit. In the event that plaintiffs wish to reply to defendants' memoranda, application will be made for permission to do so.

3. Plaintiffs, by reason of intervening equities do not challenge the conveyances made to St. Timothy Church Corporation (Warwick) and thereafter the conveyance by St. Timothy Church Corporation (Warwick) to Woloohojian Realty Corp.

Entered as an Order of this Court this 29th day of November 1988.

By Order,

_____

Clerk

Enter:

/s/ WEISBERGER, J.

WEISBERGER, J.

November 29, 1988

Know all Men by these Presents,

That I, William H. P. Faunce of the City of Providence in the State of Rhode Island in consideration of the sum of ten ($10) dollars to me paid by The Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein the receipt whereof is hereby acknowledged, do hereby remise, release, and forever QUITCLAIM unto it the said Providence Society for Organizing Charity, its successors, Heirs, and Assigns forever, all the right, title, interest, property, claim and demand, which I now have, or of right ought to have, or claim, in and to that certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N 1°14'W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°51'W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89°15'E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same property conveyed to this grantor by deed from Pyrce Owen dated February 26th, 1912 and recorded in said Town in Deed Book 81, at page 444.

To Have and to Hold, the same, with all the rights, privileges and appurtenances thereunto appertaining, unto and to the use of it the said Providence Society for Organizing Charity, its successors and assigns forever.

And I the aforenamed William H. P. Faunce for myself and for my heirs, executors and administrators, do covenant with the said Providence Society for Organizing Charity, its successors and assigns, that I will warrant and defend the aforedescribed premises unto the said Providence Society for Organizing Charity, its successors and assigns forever, against the lawful claims and demands of all persons claiming by, through or under me.

And I, Sarah E. Faunce, wife of the said William H. P. Faunce, in consideration of the sum paid as aforesaid, do hereby release and forever quitclaim unto the said Providence Society for Organizing Charity, its successors and assigns, all my right of dower in and to the aforedescribed premises.

In Testimony Whereof, we have hereunto set our hands and seals this 31st day of October in the year of our Lord one thousand nine hundred and twelve (1912).

Signed and sealed in presence of

/s/ Henry Solomon /s/ William H. P. Faunce

State of Rhode Island /s/ Sarah E. Faunce

County of Providence. In Providence on the 31st day of October A.D. 1912 before me personally appeared the above named grantors William H. P. Faunce and Sarah E. Faunce, his wife, both of them to me known and known by me to be the parties executing the foregoing instrument and severally acknowledged said instrument, by them executed, to be their free act and deed.

Recorded Nov. 1, 1912 at 8 a.m.

Witness:

/s/ James T. Lockwood /s/ Henry Solomon

Town Clerk Notary Public

Know all Men by these Presents;

That I, Patrick Fitzpatrick of the City of Providence in the State of Rhode Island (single) hereinafter called the Grantor, in consideration of the sum of Ten (10) Dollars to me paid by the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein, hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and its successors and assigns forever, in fee simple, That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxsie) and estimated to contain nineteen and ¼ (19¼) acres more or less bounding easterly on the Road from Old Warwick to Providence four hundred thirty-one (431) feet more or less southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less westerly on Great Pond Brook so called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

Being the same tract so located which formerly belonged to John N. O. Hoxsie and was conveyed by the Administratrix of his estate to this Grantor by deed recorded with the land records of said Town in Deed Book 84 at page 252.

To Have and to Hold, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of the said Grantee, and its successors and assigns forever, in fee simple.

And I, the said Grantor do hereby, for myself and for my heirs, executors, and administrators, covenant with the said Grantee and its successors and assigns that I am lawfully seized in fee simple of the said granted premises; that the same are free from all incumbrances, that I have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and its successors and assigns

shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises, and that I the said Grantor will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Grantee and its successors and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof, I have hereunto set my hand and seal this 29th day of February in the year of our Lord one thousand nine hundred and sixteen (1916).

Signed and sealed in presence of

/s/ E. Tudor Gross — /s/ Patrick Fitzpatrick

State of Rhode Island — U.S. Revenue Stamps for $3.50

County of Providence. In Providence in said County on the 29th day of February A.D. 1916 before me personally appeared the above named Grantor Patrick Fitzpatrick to me known and known by me to be the party executing the foregoing instrument and acknowledged said instrument by him executed to be his free act and deed.

Recorded Mar. 2, 1916 at 8 a.m.

Witness,

/s/ James T. Lockwood — /s/ E. Tudor Gross

Town Clerk — Notary Public

Book 232 Page 251

Know all Men by these Presents,

That Family Service, Inc., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by Children's Friend and Service, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled "*Family Service, Inc.* v. *William E. Powers, Attorney General of the State of Rhode Island*, Eq. No. 21550." does hereby give, grant, bargain, sell and convey unto the said Children's Friend and Service, its successors and assigns forever,

1. That certain estate situated on Rocky Point Road, in the town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:

Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°, 14′ W. bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°, 51′ W. bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn; thence N. 89°, 15′ E. bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on

plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan., 1883," recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

BOOK 232 PAGE 252

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by William H. P. Faunce, by deed dated October 31, 1912, recorded in the Land Records of said Town of Warwick in Deed Book 82, at page 118.

2. That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxsie) and estimated to contain nineteen and ¼ (19¼) acres more or less, bounding easterly on the Road from Old Warwick, to Providence four hundred and thirty-one (431) feet more or less; southerly on land now or lately of the Grantor (otherwise known as the "Lakeside Sanitorium' land) twenty-two hundred (2200) feet more or less; westerly on Great Pond Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by Patrick Fitzpatrick, by deed dated February 29, 1916, recorded in the Land Records of said Town of Warwick in Deed Book 92 at page 60.

TO HAVE AND TO HOLD the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

IN WITNESS WHEREOF, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be

affixed by its officer thereunto duly authorized, and by its Board of Real Estate Managers, this 28th day of March, A.D. 1951.

The consideration is not such as to require that Federal documentary stamps be affixed.

In presence of:
ARTHUR E. ERICKSON
ALLEN W. GRIFFITHS
As to H.D.S. and P.H.G.
HENRY L. P. BECKWITH
As to C.H.P.
DAVID L. ILLEGIBLE
As to D.H.I.G.
ROBERT E. ILLEGIBLE

FAMILY SERVICE, INC.
By LAURISTON E. KNOWLTON
President
BOARD OF REAL ESTATE MANAGERS
HENRY D. SHARPE
PRESTON H. GARDINER
CLARENCE H. PHILBRICK
ROBERT H. IVES GODDARD
GEORGE H. HUDDY, JR.

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April, A.D. 1951, before me personally appeared the within named Lauriston E. Knowlton, to me known and known by me to be the President of, and one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed as such president, and the free act and deed of said Family Service, Inc.

ARTHUR E. ERICKSON
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 28th day of March, A.D. 1951, before me personally appeared the within named Henry D. Sharp, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Nathan D. Gorff
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 28th day of March, A.D. 1951, before me personally appeared the within named Preston H. Gardner, to be known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Whilton Spiller
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April, A.D. 1951, before me personally appeared the within named Clarence H. Philbrick, to be known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

HENRY L. P. BECKWITH
Notary Pul.

BOOK 2 PAGE 254

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April, A.D. 1951, before me personally appeared the within named Robert H. Ives Goddard, to be known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

LANDIS E. BROWNING
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th of April, A.D. 1951, before me personally appeared the within named George H. Huddy, Jr., to be known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

ALBIE E. LONG
Notary Public

Recorded April 9, 1951 at 9:09 a.m.
Witness: Henry M. Griffiths
City Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
ALSO WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON AND
KATHLEEN PREISS,

PETITIONERS,

v.

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION AND
JOHN DOES, ONE THROUGH FIVE,

RESPONDENTS,

AND JAMES O'NEIL, IN HIS CAPACITY AS
RHODE ISLAND ATTORNEY GENERAL

ADDITIONAL PARTY - RESPONDENT

PETITIONERS' RULE 19.6 NOTICE

SIRS:

PLEASE TAKE NOTICE that, in petitioners' belief, Saint Timothy's Church Corporation (Warwick) and Woloohojian Realty Corp., both additional parties below, have no interest in the outcome of the petition herein.

Dated: June 10, 1989

/s/ ROBERT S. STITT
ROBERT S. STITT
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Providence, RI 02940
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
C. A. No. 88-0426

PROVIDENCE SC

FRIENDS OF WARWICK POND ET AL.,
PLAINTIFFS-APPELLANTS,
v.
CHILDREN'S FRIEND AND
SERVICE ET AL.,
DEFENDANTS-APPELLEES.

APPELLEE, JAMES E. O'NEIL, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND'S MEMORANDUM IN OPPOSITION TO APPELLANTS' PETITION FOR REARGUMENT

Appellants are petitioning this Honorable Court for reargument from the Order of February 23, 1989 finding that the Appellants have failed to show cause why their appeal should not be dismissed.

Appellants have not raised a single additional issue in their Petition for Reargument which was not addressed previously in their Show Cause Memorandum. This Court has seldom granted a Petition for Reargument. The purpose of reargument is to afford a Petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the Appellate Court in reviewing the case. *Brimbau* v. *Ausdale Equipment Rental*, 389 A.2d 1254, 1255 (1978); *see*, *Rhode Island Hospital Trust Company* v. *Rhode Island Covering Company*, 96 R.I. 178, 190 A.2d 219 (1963); *see also*, *Winsten* v. *Slefkin*, 88 R.I. 178 (1958). The Petitioner has failed to carry its burden of proof and has not demonstrated error in the Court's opinion.

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-31

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE also
WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners,

v.

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents,

and

JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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August 9, 1989

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying Petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority, and (b) that important discovery—addressed to the movants themselves—was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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No. 89-31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE also
WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON AND
KATHLEEN PREISS

Petitioners,

v.

CHILDREN'S FRIEND and SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION AND
JOHN DOES, ONE through FIVE

Respondents,

and

JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The background of this matter begins in the second decade of this century, when Family Service, Inc. (then known as the "Providence Society for Organizing Charity"), a charitable corporation, acquired two (2) parcels of lakeside property totaling approximately twenty (20) acres, located in the Hoxsie section of Warwick, Rhode Island (hereinafter referred to as the "Lakeside property"). The two parcels were acquired as a result of absolute and unconditional gifts to a charitable organization, Family Service, Inc.

The first parcel was acquired, in fee simple, in a 1912 deed from William H.P. Faunce (a copy of the 1912 deed is attached hereto as R.A-1). The second parcel was acquired, also in fee simple, in a 1916 deed from Patrick Fitzpatrick (a copy of the 1916 deed is attached hereto as R.A-2). An examination of the 1912 and the 1916 deeds reveals that neither instrument expresses any intent to transfer property in trust. Both deeds are in fee simple without reference to any conditions.

In 1951, Family Service, Inc. initiated a "friendly suit," an action that in fact was unwarranted by the state of the record title, to obtain the authorization of the Rhode Island Superior Court (hereinafter referred to as "R.I. Superior Court") for the conveyance of the Lakeside property to a successor charitable corporation, Children's Friend and Service, Inc. (hereinafter referred to as "CF&S"). The authorization sought by Family Service, Inc. was granted pursuant to a decree of the late Presiding Justice Walsh of the R.I. Superior Court, *Family Service, Inc.* v. *Powers*, Eq. No. 21550 (February 16, 1951).

CF&S is not a trust; it is an independent, non-profit charitable corporation, organized to facilitate adoptions and provide medical and other care to children, including temporary homes for children pending custody, guardianship, or other judicial proceedings.

In its Bill of Complaint to convey the Lakeside property to CF&S, Family Service, Inc., specifically acknowledged that neither the 1912 deed nor the 1916 deed was "made in trust and no conditions as to the use and disposal of said Lakeside property were imposed by the grantor's or by the persons who caused said conveyances to be made." (a copy of the 1951 Bill of Complaint is attached hereto as R.A-3).

In the 1951 Bill of Complaint, the applicants recited their doubt as to whether any decree of the court was necessary to authorize the applicants to transfer title to CF&S. In fact, the 1951 court proceeding was entirely unnecessary since the predecessor charity, Family Service, Inc., held title to the Lakeside property in fee simple without any restrictions.

The R.I. Superior Court approved the conveyance of the Lakeside property to CF&S "to be held by said Children's Friend and Service for its general uses and purposes." (a copy of the 1951

final decree of the R.I. Superior Court is attached hereto as R.A-4). This is the classic language used to create a fee simple. The 1951 deed from Family Service, Inc. to CF&S contains the identical language conveying the Lakeside property to CF&S "to be held by said Children's Friend and Service for its general uses and purposes" (a copy of the 1951 deed from Family Service, Inc. to CF&S is attached hereto as R.A-5).

Approximately eight years ago, the Board of Directors of CF&S concluded that the Lakeside property was no longer suitable for child care facilities.[1] The Board decided to seek buyers for the Lakeside property, merely intending to change the form of one of its numerous assets from real property to cash, which would then be used for the general uses and purposes of CF&S in aiding children.

The Board of Directors of CF&S initially sought to sell the property to either the City of Warwick or the State of Rhode Island, but discovered that there were insufficient public funds to purchase the Lakeside property at its appraised value of Nine Hundred Thousand Dollars ($900,000). After exhausting all public sources of funds, CF&S sold the Lakeside property to respondent Frank P. Sherry on or about June 14, 1987. Subsequently, respondent Sherry conveyed the property to respondent R & F Associates.

The Petitioners are a group of homeowners in the area surrounding the subject property who lack any legal or equitable interest in the Lakeside property. The subject property is not a park or playground, and the general public is not and never has been invited to make any recreational use of the property. The Lakeside property is private property, and the Petitioners are neighbors who object to its sale simply because they are opposed to further development in their neighborhood.[2]

---

1. A substantial portion of the property conveyed to CF&S in 1951 was later conveyed by CF&S to Saint Timothy's Church Corporation, which in turn sold some of the land for residential development.

2. The Petitioners allege that the sale of the Lakeside property was shrouded in secrecy, and imply that their attempts to contact the Directors of CF&S were somehow frustrated. (See Affidavit of Petitioner Paul Huling in Opposition to Motion for Summary Judgment, pages 15-25 of Petitioners' Appendix.) In fact, there had been reports in various local newspapers since approximately 1982, stating that the Lakeside property was for sale and *(continued)*

The Petitioners commenced this action on or about August 4, 1987, by filing an action in the R.I. Superior Court to void the sale and conveyance of CF&S's Lakeside property to respondent Sherry. The Petitioners also sought a declaratory judgment to the effect that the Lakeside property was held by CF&S as a charitable trust and any conveyance was therefore subject to the *cy pres* authority of the R.I. Superior Court. The Petitioners characterized this lawsuit as a class action, however, no class was ever certified.

A threshold Motion to Dismiss by CF&S pursuant to Rule 12(b)(6) of the R.I. Rules of Civil Procedure, was denied by the R.I. Superior Court on August 24, 1987.

On April 1, 1988, CF&S filed a Motion for Summary Judgment, pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. The Summary Judgment Motion was granted after oral argument on June 13, 1988, and an Order was entered on July 1, 1988 (a copy of the R.I. Superior Court's July 1, 1988 Order is attached hereto as R.A-6).

The Petitioners appealed on July 6, 1988 to the Rhode Island Supreme Court (hereinafter referred to as "R.I. Supreme Court") from the Order granting CF&S's Motion for Summary Judgment. Briefs were submitted by the parties (except the R.I. Attorney General, who adopted the brief of one of the Respondents), and oral argument was held on February 13, 1989. The R.I. Supreme Court summarily denied the Petitioners' appeal and an Order was entered on February 23, 1989 (a copy of the R.I. Supreme Court's February 23, 1989 Order is attached hereto as R.A-7). The Petitioners filed a Petition for Reargument on February 28, 1989, which was denied by the R.I. Supreme Court on March 13, 1989.

ARGUMENT

The Petition for Writ of Certiorari is wholly without merit and should be summarily denied by the Court. As more fully argued below, the Petitioners have failed to allege any federal question or

---

chronicling the interest of several charitable agencies and developers. During this entire period, there were "for sale" signs posted on the property.

As far as any difficulty in contacting the Directors of CF&S, the simple truth is that CF&S is a United Way agency, which has on file the names and addresses of all CF&S officers and directors.

other valid basis for jurisdiction in this matter, and lack standing in this matter, and thus are not entitled to a judicial determination of the merits of their claim. The Respondents will address the questions presented in the following order:

(1) Jurisdiction;

(2) Standing;

(3) Summary Judgment; and

(4) Role of Attorney General

I.

JURISDICTION

This Court is being asked to review a decision by the R.I. Supreme Court affirming a R.I. Superior Court's grant of summary judgment in favor of Respondents. Jurisdiction is claimed under 28 U.S.C. Sec. 1257[3] and Supreme Court Rule 17 on the basis that the R.I. Supreme Court decided issues of federal law.[4]

---

3. Section 1257 was recently amended by the Supreme Court Case Selections Act. Pub.L.No. 100-352, 102 Stat. 662 (1988). Paragraphs (1) and (2) of former Section 1257 were eliminated and only the *certiorari* procedure, of what was previously paragraph (3), was retained. Former paragraph (3) became subdivision (a) under new Section 1257. The last clause of the prior statute, treating the District of Columbia Court of Appeals as the equivalent of a State Court for purposes of Section 1257, was retained and lettered subdivision (b).

The Act became effective on June 27, 1988. However, the Act does not apply to cases, "Then pending in the Court or judgments or decrees subject to appeal that have been issued prior to the effective date of the Act." Supreme Court Case Selections Act, Pub. L. No. 100-352, Sec. 7, 102 Stat. 662 (1988). The R.I. Superior Court decision was issued on July 1, 1988. The R.I. Supreme Court decision was issued on February 23, 1989. A Petition for Reargument was denied on March 13, 1989.

The relevant decisions in this case occurred after the effective date of the amendment and therefore the amended version of Section 1257 applies in this case.

4. Petitioner also claims jurisdiction under 28 U.S.C. Sec. 2106. This section provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. *(continued)*

Petitioners' claim of federal question jurisdiction must fail for the following reasons:

(a) The alleged federal questions presented in Petitioners' Writ of Certiorari were never raised with, or considered by, the R.I. Supreme Court; and,

(b) This case does not involve issues of federal law.

A. Failure to Present Issues to State Supreme Court

Respondents filed a Motion For Summary Judgment with the R.I. Superior Court on the basis that Petitioners lacked standing and that the real estate sale did not constitute a breach of trust. The R.I. Superior Court ruled that the real estate was not subject to the *cy pres* doctrine and that as a consequence thereof, there remained no material issue of fact to be resolved and that Respondents' were entitled to Summary Judgment as a matter of law.

Petitioners appealed this decision to the R.I. Supreme Court wherein they raised one question—"May a successor *cy pres* charity holder, acting unilaterally and without seeking or obtaining prior R.I. Superior Court authority, convey twenty acres of charitable recreational primarily open land (adjoining Warwick Pond) for private development and profit. . .[under certain factual conditions]." R.I. Supreme Court subsequently asked the parties to brief the following issues:

(a) whether a question of fact exists which should have precluded the entry of summary judgment,

(b) whether the trial justice erred as a matter of law in granting summary judgment even if no question of fact was disclosed on the record,

(c) whether the plaintiffs had standing to challenge the conveyances,

(d) whether issues presented by the parties have been preserved for appellate review.

Following briefing and oral argument by the parties, the R.I. Supreme Court denied and dismissed the appeal.

As outlined, infra, Petitioners do not have federal question jurisdiction in this case. Therefore, Petitioners are not lawfully before this Court and Section 2106 is without effect.

A Petition for Reargument was then filed on February 28, 1989. The Petition states in relevant part that:

> The Court's order/decision contains or represents clear error. Such error is appropriately demonstrated when viewed in three parts:
>
> (1) the Court's statement that only the [State] Attorney General has standing to bring suit regarding breach of charitable trust;
>
> (2) the undertaking of the R.I. Superior Court, if not this Court, to decide on summary judgment mixed questions of law and fact relating to
>
> (a) the trust nature of the Lakeside property and
>
> (b) whether the 1951 conveyance authorized by Judge Walsh's *cy pres* order constituted an unrestricted fee simple transfer; and
>
> (3) the Court's indicated reliance on an unpublished, non-recorded [State] Attorney General opinion or finding of "no fault" in CF&S' unilateral sale of the Lakeside property for commercial real estate development.

The Petition was summarily denied on March 13, 1989.

By letter dated March 16, 1989, Petitioners advised the R.I. Supreme Court that they planned to file a Petition for a Writ of Certiorari with the United States Supreme Court on equal protection and due process grounds. At the time that letter was written, Petitioners' civil action had terminated.

On June 10, 1989, Petitioners filed the within petition wherein they presented four questions for review. Petitioners' four questions are couched in terms of federal questions and federal constitutional issues. Notwithstanding Petitioners' drafting techniques, this Court does not have jurisdiction to pass upon any federal question or federal constitutional issue which was not raised or considered in the state court from which the appeal was taken. *Miller (for Use of United States)* v. *Nicholas*, 4 Wheat. 311, 315, 17 U.S. 311 (1819); *Murdock* v. *Memphis*, 20 Wall. 590, 87 U.S. 590 (1875); *Dewey* v. *Des Moines*, 173 U.S. 193, 197-201 (1899); *Whitney* v. *California*, 274 U.S. 357, 362-363 (1927); *McGoldrier* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U.S. 154, 160-163 (1945); *Safeway Stores*

Inc. v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 342, n.7 (1959); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). See also *Illinois* v. *Gates*, 462 U.S. 213, 218-20 (1983).

The record in this case clearly demonstrates that no federal question or federal constitutional issue was ever raised with, or considered by, the R.I. Supreme Court[5] Consequently, this Court is without jurisdiction to consider Petitioners' appeal and the Petition for Writ of Certiorari must be denied.

B. Absence of a Federal Question

Federal question jurisdiction is claimed by Petitioners on the basis that (1) the decision below turned on issues of state adopted federal law, and (2) Petitioners were denied equal protection of the law and due process. Notwithstanding Petitioners' utter failure to present the R.I. Supreme Court with the questions raised herein, Petitioners' claim of federal question jurisdiction is without merit.

1. State Adopted Federal Law.

The R.I. Supreme Court's decision did not turn on state adopted federal law. To the contrary, the record clearly demonstrates that the courts below were presented with issues of state law involving standing and summary judgment and that state law formed the basis for their decisions.[6] However, even if one assumes that Rhode Island's law on standing and summary judgment was adopted or developed by reference to similar rules of

5. Petitioners argue that a federal question was presented to the R.I. Supreme Court in their Petition for Reargument. However, raising a federal question for the first time in a petition for reargument/rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945); *Hanson* v. *Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935). As noted above, the Petition for Reargument was summarily dismissed: therefore, Petitioner's argument is without merit.

6. Petitioners argue that the R.I. Supreme Court's decision turned on state adopted federal law i.e., injury-in-fact standing, *res judicata* and its application to fundamental/subject matter jurisdiction. The issue of *res judicata* and its application to fundamental subject matter jurisdiction was never raised in the courts below, and therefore, its casual assertion in Petitioners' argument must be ignored.

law that exist in federal statutes or have emerged in decisions by federal courts, an assumption which Respondents reject, this Court has consistently held that state adopted federal law does not serve as a basis for federal question jurisdiction. *Miller's Executors* v. *Anderson,*150 U.S. 132 (1893). This case has also been referred to in the case law as *Miller's Executors* v. *Swann.* Later case law is consistent with *Anderson, See e.g., Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934); *Smith* v. *Kansas City Title Co.*, 255 U.S. 180 (1921); *Shoshone Mining Co.* v. *Rutter,* 177 U.S. 505, 507 (1900); *Union National Bank* v. *Louisville R.R.*, 163 U.S. 325, 331 (1896); *Mobil Oil Corp.* v. *Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir. 1982), *cert. denied,* (1982); *Morris* v. *Danna,* 411 F.Supp. 1300 (D. Minn. 1976), *aff'd,* 547 F.2d 436 (8th Cir. 1977).

Petitioners' claim of federal question jurisdiction is based solely on the bald assertion that the decision below turned on state adopted federal law. This Court does not recognize a claim of "state adopted federal law" as a basis for federal question jurisdiction. Therefore, Petitioners' Writ of Certiorari must be dismissed for want of a federal question.

2. Federal Constitutional Issue.

In addition to their claim of federal question jurisdiction, Petitioners' claim this Court's jurisdiction on the basis that the court below committed plain error. Given Petitioners' obvious failure to present the court below with any federal issue, this claim is nothing more than an attempt to circumvent the Court's jurisdictional requirements under the guise of Supreme Court Rule 34.1(a) and 28 U.S.C. 2106.

Rule 34.1(a) provides:

> 1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:
>
> (a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the

> Court may consider a plain error not among the questions presented *but evident from the record and otherwise within its jurisdiction to decide.*

Id. (emphasis added).

The italicized portion of Rule 34.1(a) emphasizes that the option to consider a plain error is exercisable not as a means of determining whether jurisdiction exists, but only to correct an error "evident from the record" that is "otherwise within its jurisdiction to decide." Jurisdiction must therefore be established on the basis of other federal questions, raised or decided below and presented to the Court, and the error itself must be federally grounded—this in fact is the context in which the Court has exercised the plain error option in state court cases. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 166 (6th ed. 1986) citing *Terminiello* v. *Chicago,* 337 U.S. 1, 5-6 (1949); *Boynton* v. *Virginia,* 364 U.S. 454, 457 (1960); *Vachon* v. *New Hampshire,* 414 U.S. 478, 479 n. 3 (1974); *Wood* v. *Georgia,* 450 U.S. 261, 264-65, n. 5 (1981); and *Illinois* v. *Gates,* 462 U.S. 213, 219-220 (1983). As noted earlier, Petitioners have failed to establish a basis for federal question jurisdiction. Therefore, the claim of plain error is without merit.

Similarly, 28 U.S.C. Sec. 2106 allows the Court to "require such further proceedings... as may be just under the circumstances" in actions that are lawfully brought before it for review (emphasis added). This section "does not purport to expand the statutory limits on the Court's jurisdiction; rather, it relates only to the disposition of the case once jurisdiction exists." *Wood* v. *Georgia,* 450 U.S. at 281 (White, dissenting).

Respondents have clearly established that Petitioners failed to assert any federal issue in the court below and that federal question jurisdiction does not exist in this case. Therefore, Petitioners are not lawfully before this Court and Section 2106 is without effect.

II.

STANDING

A. The Petitioners Failed to Meet the Injury in Fact Test for Determining Standing to Maintain this Action

It is undisputed that, even if the legal claim is correct, the litigant advancing it must be properly situated to be entitled to its judicial determination. 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, Sec. 3531 (1984). The standing requirement is an essential preliminary to reaching the merits of the claim, and the inquiry focuses on the party seeking to get his complaint before a federal court, not on the issues he wishes to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). It is the responsibility of the petitioner to clearly allege facts demonstrating that he is a proper party with standing to invoke judicial resolution of a dispute. *Warth* v. *Seldin*, 422 U.S. 490 (1975).

In order to satisfy the constitutional requirement of Article III that there be an actual case or controversy, courts require a plaintiff to have a personal stake in the outcome.[7] If the plaintiff cannot surmount the hurdle of standing, the court is precluded from deciding the merits of the plaintiff's case.

The Petitioners lack standing to maintain this action because they do not have any interest, whatsoever, in the conveyance of the Lakeside property. They are merely a group of neighbors objecting to the sale of a piece of property within their neighborhood. One cannot successfully invoke the jurisdiction of a court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or legal or equitable right, title or interest in the subject matter of the controversy. 59 Am. Jur. 2d *Parties*, Sec. 30 (1987).

The only conceivable injury alleged by the Petitioners is that Lakeside property has been sold to a party who will develop the land. The Petitioners fear that the development of the Lakeside property will somehow lessen the monetary value of their homes,

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7. "The requirement that a prospective plaintiff must suffer injury in fact assures that such plaintiff will have the personal stake and interest that import the concrete adverseness required by Article III of the Constitution. . . without such injury in fact no case or controversy is present." *McDowell* v. *Schlesinger*, 404 F.Supp. 221, 242 (D.C.W.D. Mo. 1975).

a concern which is purely speculative on the part of the Petitioners.[8] They bring this action for their own selfish purposes; completely unrelated to the property in question or any of its uses. This so-called "injury" is not legally cognizable under any possible interpretation of the tests for standing as developed by the United States Supreme Court and by the R.I. Supreme Court. The principles of standing are of two sorts—constitutional and "prudential."

The constitutional standing rules seek to ensure that a concrete Article III case or controversy exists by focusing on the plaintiff's "harm." This analysis asks whether the plaintiff has "in fact" suffered a redressable injury as a result of the defendant's action.[9] The analysis imposes three strict requirements:

(a) Whether the plaintiff has suffered a distinct and palpable injury, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-474 (1982); *Matunuck Beach Hotel, Inc.* v. *Sheldon*, 399 A.2d 489, 493, 121 R.I. 386 (1979); *Renza* v. *Murray*, 525 A.2d 53, 55, __R.I.__ (1987);[10]

(b) a causal connection between the injury and the complained-of-acts; *Warth* v. *Seldin*, 422 U.S. at 519, (1975), *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); and

(c) Whether this injury is apt to be redressed by a remedy that the court is prepared to give, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976).[11]

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8. The risk of additional development in the surrounding area is one faced by all homeowners; a more suitable remedy for the Petitioners would have been a zoning challenge, however, Petitioners never pursued this course of action.

9. As stated in *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973), the court's jurisdiction can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . ." (emphasis added).

10. Rhode Island adopted the "injury in fact" test for standing in *Rhode Island Ophthalmological Society* v. *Cannon*, 317 A.2d 124, 129, 113 R.I. 16 (1974): "The question is whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged statute. If he has, he satisfies the requirement of standing."

11. The *Valley Forge Christian College* case, *supra*, is illustrative of both the constitutional and prudential principles. The Secretary of Health, Education and Welfare conveyed a surplus army hospital to a sectarian college, without charge, on the condition that for twenty years the facility *(continued)*

A plaintiff who has established the constitutional element of standing must go further and convince a court that various "prudential" considerations also warrant hearing the case, such as showing that his "injury" is of a sort against which the law seeks to protect him, or by showing that his claim falls within the zone of interests to be protected or regulated by statute or constitutional guarantee, *Valley Forge Christian College, supra,* 454 U.S. at 474-475.

In this matter, however, there is no need for consideration of any "prudential" rules of standing, because an examination of the legal rights and interests of the Petitioners discloses that the "injury" alleged here is totally abstract and speculative, and thus, is insufficient to satisfy the constitutional principles of standing. The Petitioners cannot allege a distinct and palpable injury to any legally protected interest because they have no legal or equitable interests in private property.

The Petitioners' claim of "monetary, recreational, and environmental damage to themselves, their homes, and their community" is outside any recognized concept of "injury." The Petitioners have not, and will not, suffer any recreational or environmental damage because the privately owned Lakeside property has never been available for use by neighboring landowners as a park or playground. The statement on page 11 of the Petition that "Lakeside is a mid-Rhode Island environmental oasis" is simply hyperbole; the Lakeside property has been used exclusively by CF&S for its own charitable programs and the land has been developed to the extent that CF&S in the past thirty-eight (38) years constructed several buildings at a cost of Three Hundred Thousand Dollars ($300,000). The only conceivable "injury" of the Petitioners is an abstract and speculative concern that the development of the Lakeside property will somehow erode their nearby property values.[12]

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be devoted solely to educational purposes. The plaintiffs, a taxpayer organization consisting of 90,000 members, brought suit to set aside the conveyance, claiming that the transaction violated the Establishment Clause of the First Amendment. The Supreme Court held that the plaintiffs lacked standing because they had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." 454 U.S. at 480.

12. The Petitioners cite the case of *Blackstone Valley Chamber of Commerce* v. *Public Utilities Commission,* 452 A.2d 931, *(continued)*

The matter of *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* is illustrative of cases involving speculative injury as a basis for standing. The plaintiff group consisted of an organization of indigents unable to afford hospital services which filed a lawsuit challenging a ruling by the Internal Revenue Service (IRS) allowing hospitals to qualify for "charitable" tax advantages without providing free care services to indigents.

At the outset, the *Simon* Court indicated that the indigent organizations could not establish standing simply on the basis of the goals of their organization. 426 U.S. 26, 41 (1976). The standing question, the Court noted, "turns on whether any individual respondent has established an actual injury, or whether respondent organizations have established actual injury to any of their indigent members," 426 U.S. 26, 41.[13]

The *Simon* Court concluded that, in light of the many factors that go into a hospital's indigent care policy, it would be "purely speculative" whether the indigent organizations would be denied free health services as a result of the IRS ruling rather than because of other factors. 426 U.S. at 43. The Court cited previous decisions in which "unadorned speculation" failed to suffice as a basis for standing, including *Warth* v. *Seldin, supra,* in which the Court held that low income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing because they failed to show that the alleged injury (inability to

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__R.I.__ (1982) for the proposition that "concrete adversity" exists in this case sufficient to confer standing. Petitioners misapprehend the holding of *Blackstone Valley* in which standing was denied. The R.I. Supreme Court noted that "the essence of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to insure concrete adverseness that sharpens the presentation of issues upon which the court depends for an illumination of the questions presented," 452 A.2d at 932-933.

13. As in *Simon,* the Petitioners here sought to maintain this action as a class action, although no class was ever certified below. Even if this suit was a class action, it makes no difference to the question of standing, "for even named plaintiffs who represent a class must allege and show that they have been personally injured." *Warth* v. *Seldin, supra,* 422 U.S. at 502. In class actions, injury to particular members is required. *U.S.* v. *SCRAP,* 412 U.S. 669 (1973).

obtain affordable housing) was attributable to the challenged ordinance instead of to other factors.[14]

A similarly speculative "injury" was determined to be insufficient to confer standing by the First Circuit in the case of *Munoz-Mendoza* v. *Pierce*, 711 F.2d 421 (1st. Cir. 1983), in which a Chinatown neighborhood association in Boston challenged a decision by the Department of Housing and Urban Development to award an "Urban Development Action Grant" (UDAG) to the city to develop the Copley Plaza commercial complex. The neighborhood association argued that "injury in fact" arose from the risk of increased rents which could result from the development of the Copley Plaza complex, leading to the displacement of the plaintiffs from their neighborhoods.

The First Circuit rejected standing on this basis: "Given the uncertainty as to whether any individual will have to pay increased rent or be displaced, and the much greater uncertainty about whether the same result would have occurred in the absence of the UDAG, this case involves just as much speculation as *Simon*," 711 F.2d at 426. (Significantly, the First Circuit upheld standing on the basis of the plaintiffs' claim that the UDAG would increase racial segregation in neighborhoods; the Court reasoned that deprivation of the advantages of living in an integrated community is sufficient to satisfy the constitutional standing requirement.)[15] There are no racial segregation issues in this case, or other issues which are even arguably within the

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14. The Court's language in *Seldin*, quoted by the Court in the *Simon* decision, is directly applicable to this petition; the *Seldin* Court noted that the plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had (defendants) acted otherwise, and might improve were the Court to afford relief." 422 U.S. at 507. To this one might add the Court's statement in *Valley Forge Christian College* that "the federal courts were simply not constituted as ombudsmen of the general welfare." 454 U.S. at 487.

15. The Supreme Court has recognized that the denial of an opportunity to live in an integrated community is injury sufficient to satisfy the constitutional requirements of standing; in particular, the Court has recognized that injury is properly alleged when plaintiffs claim a deprivation "of the social and professional benefits of living in an integrated society." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111-112. (1979).

zone of interests protected by any statute or constitutional guarantee.[16]

The Petitioners here completely lack any legal or equitable interest in the Lakeside property, and, as bystanders and members of a neighborhood association, they allege a speculative injury similar to the risk of increased rents and displacement which was rejected as a basis for standing in *Pierce*. The causal linkage involved here—from the sale of the Lakeside property by CF&S to the respondent Sherry, to the conveyance from respondent Sherry to respondent R & F Associates, to the development of the Lakeside property consistent with the applicable zoning and land use controls, to the eventual erosion of property values—is too speculative to constitute direct and palpable injury for standing purposes.[17] Any conceivable "injury" stemming from the loss of what the Petitioners characterize as an "environmental oasis" is a chimera; the Lakeside property is not a park or playground, and the property has never been used as such by the Petitioners or any members of the general public.

Accordingly, the Petition for Writ of Certiorari must be denied because the Petitioners have failed to demonstrate that they meet any of the constitutional elements for standing to maintain this action.

B. Petitioners' Lack of Standing to Enforce Charitable Trust

As discussed in the argument relating to Summary Judgment, the R.I. Superior Court correctly determined, on the basis of the

16. The Petitioners have also failed to properly allege any injury to aesthetic and "environmental well-being" as applied by the Supreme Court in relation to lawsuits under Section 10 of the Administrative Procedures Act, 5 U.S.C. Sec. 702, such as *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Aesthetic and environmental well-being are "cognizable interests" sufficient to lay the basis for standing under Section 10 of the APA, "[B]ut the injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." 405 U.S. at 734-735. The Petitioners' attempt to place themselves in the posture of the plaintiffs in *Sierra Club* v. *Morton* misses the mark; in *Morton*, the subject property was public land devoted to recreational purposes such as hiking, camping and fishing.

17. One may equally speculate that adjoining property values may be increased, or be totally unaffected, by any future development of the Lakeside property.

undisputed state of the record title, that the Lakeside property is not held in trust.

Even if the Lakeside property was held in trust, however, the Petitioners lack standing to maintain an action to enforce the terms of a charitable trust.

It is well settled that a suit for the enforcement of a charitable trust can be maintained only by the State Attorney General or other public officer (as the representative of the public), or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons lacking a special interest in the charitable trust who are merely members of the public at large, or taxpayers, or even potential beneficiaries of a charitable trust. 15 Am. Jur. 2d *Charities*, Sec. 143 (1976).

It has long been recognized at common law that the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts. The source of this power was discussed by 3 Blackstone, *Commentaries* 427 as being based on the premise that:

> The king, as *parens patriae*, has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor.

The rationale for vesting in the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is apparent. The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. Many times no specific individual can prove that he will necessarily benefit from the charity. All may be prospective or possible beneficiaries, but no one can be determined to be a certain recipient.

The Petitioners make the absurd assertion that the R.I. Supreme Court carved out a new rule denying Petitioners standing and applied it retroactively (page 2, Petition). Rhode Island has adhered to the general rule regarding the enforcement of charitable trusts since at least 1905, when the R.I. Supreme Court decided *Stearns* v. *The Newport Hospital*, 62 A.132, 27 R.I. 308 (1905), which involved a petition for an accounting of trust assets. Explicitly rejecting the notion that taxpayers have standing in such cases, the R.I. Supreme Court in *Stearns*

described the responsibility of enforcing charitable trusts as follows: "The trust is a public one, and the Attorney General is the proper person to represent the public in any judicial inquiry into the conduct of the trustee in administering it." 27 R.I. at 316.

Far from enunciating a new rule of standing, the R.I. Supreme Court merely applied the general rule that has been consistently followed since at least 1905. The Petitioners cite four Rhode Island cases as standing for the proposition that the Attorney General is not the sole person who may bring suit to enforce charitable trust duties. The Petitioners have misled the Court by seriously mischaracterizing the holdings of these cases. *Newport Hospital* v. *Harvey*, 133 A. 648, 47 R.I. 382 (1926), the first case cited by the Petitioners, was a suit for specific enforcement of a purchase agreement involving land owned by a charitable trust. The action was not to enforce a charitable trust and the court simply noted that because the land in question is held by a charitable trust, the Attorney General should be a party to the proceedings.

The second case cited by the Petitioners is *Powers* v. *Home for Aged Women*, 179 A. 610, 55 R.I. 187 (1935), which involved a suit by a trustee for construction of a will making a series of bequests to charitable corporations. The court recites that:

> It is well settled in this state and elsewhere that the attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and that he should be made a party in any suit in which the existence or the validity of such a trust or such a bequest is really in question or the administration of such a trust is involved,".

Id. at 192.

Any fair reading of *Powers* would underscore its congruence with *Stearns* v. *The Newport Hospital, supra.*

A similar decision is *Leo* v. *Armington*, 59 A.2d 371, 74 R.I. 124 (1948) the third case cited by the Petitioners, which holds that where suit is brought by the trustees for instructions, or where suit is brought by others having a special interest in a charitable trust, the Attorney General is a necessary party.

The final case cited by the Petitioners is *Israel* v. *National Board of Y.M.C.A.*, 369 A.2d 646, 117 R.I. 614 (1977), a matter

in which the Attorney General sought to enjoin the diversion of trust funds from a Rhode Island estate. The opinion quotes language from the earlier decisions in *Powers* and *Armington* to the effect that the Attorney General should be a party in any suit in which the existence or the validity of such a trust or such a bequest is really in question, referring to actions instituted by trustees or others with a special interest in the charitable trust, but the court clearly states that the Attorney General has the sole authority under common law to enforce, on behalf of the public, the provisions of charitable trusts affecting Rhode Island interests. "Thus, the Attorney General of Rhode Island has the power and authority under common law to enforce the provisions of charitable trusts affecting Rhode Island interests." 369 A.2d at 649.

The cases cited by the Petitioners do not stand for the proposition asserted in their petition, rather they merely reflect the well recognized exceptions to the common law rule that the Attorney General alone has the power to maintain suits for the enforcement of charitable trusts.

It is well settled in Rhode Island and elsewhere that where a person having a special interest in the performance of a charitable trust brings suit for the enforcement of the trust, the Attorney General is a necessary party to the suit, since his presence is necessary for the protection of the interests of the community in the performance of the trust.

A person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement, but he must show that he is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled. *Hardman* v. *Feinstein,* 240 Cal. Rptr. 483, 485 (Cal. App.1 Dist. Ct. 1987); *Clevenger* v. *Rio Farms,* 204 S.W. 2d 40 (Tex. Civ. App., 1947); *Schaeffer* v. *Newberry,* 35 N.W. 2d 287, 227 Minn. 259 (1948).

A person who has no interest in the performance of the trust, other than as a member of the community, cannot maintain a suit for the enforcement of the trust. *Coffee* v. *William Marsh Rice University,* 403 S.W. 2d 340 (Tex., 1966), III Scott *Trusts*, Sec. 391, p. 2054 (3rd ed. 1967). He may, if he can, induce the Attorney General to bring a suit, and the Attorney General may,

if he chooses, bring the suit only if the complaining party is willing to act as relator and assume responsibility for the payment of costs.[18] But a third person who has no special interest cannot himself maintain the suit.

The Petition for Writ of Certiorari must be denied because, even if a question of trust status existed in this case, the Petitioners, who have no special interest in the Lakeside property, lack standing to maintain an action for the enforcement of a charitable trust.

III.

GRANTING OF MOTION FOR SUMMARY JUDGMENT BELOW WAS PROPER

The R.I. Superior Court correctly granted the Motion for Summary Judgment, and the judgment was properly affirmed by the R.I. Supreme Court.

The essence of the Petitioners' claim is that CF&S breached the terms of the charitable trust by which it holds title to the Lakeside property by conveying the property to a third party without the permission of, or notice to, the court or the Attorney General; the gravamen of the Petitioners' claim is their contention that CF&S should have petitioned the court for a *cy pres* proceeding instead of conveying the property to a third party.

The Petitioners' claim is entirely based on the mistaken assumption that the Lakeside property is held by CF&S in trust. This assumption is completely unsupported by the facts surrounding the original conveyances to the predecessor charity, Family Service, Inc., which amply demonstrate that the deeds and chain of title into Family Service, Inc., are in fee simple without reference to any conditions. Despite the state of the record title, the Petitioners assert that it was error for the R.I. Superior Court to grant a Summary Judgment Motion where there were mixed questions of law and fact relating to the trust nature of the property.

The determination of whether a trust exists is clearly a legal question for the court and one that is appropriately within the scope of a summary judgment motion. The R.I. Superior Court,

18. In this matter, the Rhode Island Attorney General, as the record below indicates, declined to permit the Petitioners to institute suit as relators.

in deciding the Summary Judgment Motion, possessed conclusive evidence of the lack of any intention in the original deeds to convey the Lakeside property in trust.

Section 18-9-4 of the Rhode Island General Laws (1985 Reenactment) defines a charitable trust as "any fiduciary relationship with respect to property arising as the result of an intention to create it and subject the person by whom the property is held to equitable duties to deal with the property for charitable, educational, or religious purposes."

The donor's intent, therefore, is crucial in determining whether property is held in trust. The Petitioners have relied heavily on the erroneous conclusion that any gift to a charitable corporation implies that the gift is impressed with a trust, thereby confusing the important distinction between an unconditional gift to a charitable corporation and a gift in trust to a charitable corporation.

A gift to a charitable corporation does not imply that the gift is impressed with a trust, IV Scott *Trusts*, Sec. 348.1 (3rd ed., 1967). A number of Rhode Island cases have held that a bequest or gift to a charitable organization does not necessarily imply that the gift is impressed with a trust, *Guild* v. *Allen*, 67 A. 855, 857, 28 R.I. 430 (1907); *Rhode Island Hospital Trust* v. *Williams*, 148 A. 189, 50 R.I. 385 (1929); *Israel* v. *National Board of Y.M.C.A.*, 369 A.2d 646, 684, 117 R.I. 624 (1977). Instead, a donor can make an absolute and unconditonal gift to a charitable organization with the expectation that the gift will be used to promote a general charitable purpose, *Guild*. 67 A. at 857.

In this case, the two parcels of land originally conveyed to the Providence Society for Organizing Charity were absolute and unconditional gifts. Both the 1912 deed from William Faunce (R.A-1) and the 1916 deed from Patrick Fitzpatrick (R.A-2) were devoid of any granting language expressing an intent to impress a trust upon the property. The Fitzpatrick deed clearly states that the property is conveyed to the Providence Society for Organizing Charity in fee simple.

The Petitioners also allege that it was error for the R.I. Superior Court to grant Summary Judgment where there was a mixed question of law and fact concerning the 1951 proceeding in which

title to the Lakeside property was transferred from Friends Service, Inc. to CF&S.[19]

Again, the determination of whether the Lakeside property was held in trust at the time of the 1951 proceeding is strictly a legal question, and the R.I. Superior Court had ample evidence before it concerning the state of the record title in 1951.

When Family Service, Inc., the predecessor charity, petitioned the R.I. Superior Court to approve a transfer of the property to CF&S in 1951, it explicitly stated in its Complaint that neither parcel of property originally conveyed to Friends Service, Inc. in

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19. The Petitioners' assertions of plain error below are substantively without merit. Petitioners appear to suggest that the Superior Court's denial of Respondents' Motion to Dismiss is *res judicata* on the issue of Petitioners' claim of standing. *Res judicata* prevents the relitigation of factual questions or legal issues decided in previous litigation. See *generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, Sec. 4401 *et seq.* (1981). The doctrine of *res judicata* bars a later suit when the first suit (1) results in a final judgment on the merits, (2) the first suit was based on proper jurisdiction, (3) both suits involved the same cause of action, and (4) both suits involved the same parties and their privies. *Lovell* v. *Mixon*, 719 F.2d 1373 (8th Cir. 1983). Petitioners do not satisfy the requisite elements of the doctrine and therefore its assertion in this case is without merit.

By contrast, law of the case ordinarily precludes a court from re-examining an issue previously decided by the same court in the same case. The laws of the case doctrine does not, however, foreclose reconsideration of subject matter jurisdiction. *Amen* v. *City of Dearborn*, 718 F.2d 789 (6th Cir. 1983). Therefore, a review of Petitioners standing at the summary judgment stage and appellate stage was perfectly tenable and appropriate, particularly since the standing decision Petitioners rely on came during a Motion to Dismiss, which is evaluated solely from the face of the complaint.

The Rhode Island Supreme Court has noted in *Taveira* v. *Solomon*, 528 A.2d 1105, ___ R.I. ___ (1987), that:

> "The doctrine of the law of the case, while certainly a practice generally to be followed, should not be used to perpetrate clear error flowing from an early erroneous ruling."

See 1B Moore's *Federal Practice* para. 0.404(1) at 123-24 (2d ed. 1984).

> "In sum, the doctrine of the law of the case as applied to successive prejudgments of the trial court, is not a rule to perpetuate error and does not require a court to enter an erroneous judgment because the logic of an earlier erroneous ruling would require it. It is merely a practice that protects the ability of the court to build its final judgment by cumulative rulings, with reconsideration or review postponed until after the judgment is entered."

1912 and 1916 was impressed with a trust. The 1951 R.I. Superior Court decree which approved the conveyance to CF&S recognized the state of the record title and authorized the Lakeside property to be conveyed to CF&S "for its general uses and purposes," the classic language for creating a fee simple property interest. See R.A-4 (1951 Superior Court Decree). As suggested by the language of the 1951 Bill of Complaint, the entire *cy pres* proceeding was unwarranted and unnecessary, because the Lakeside property was never held in trust. The deeds and chain of title of both CF&S and its predecessor in title are in fee simple without reference to and any conditions other than general charitable uses and purposes. See R.A-5 (1951 Deed from Family Service, Inc. to CF&S). Thus, when CF&S sold the Lakeside property to a third party, it was not in breach of any charitable trust. The R.I. Superior Court correctly granted Summary Judgment based upon the undisputed state of the record title.

Moreover, CF&S, as a non-profit charitable corporation, did not need the approval of the Rhode Island legislature to sell the Lakeside property. A 1984 amendment to the Rhode Island statute allowing charitable corporations to own and convey property provides authority "To purchase, take, receive, lease, take by gift, devise or bequest or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property or any interest herein, wherever situated without restriction as to amount." (Title 7, Chapter 6, Section 5, Subsection 4, Rhode Island General Laws, 1985 Reenactment). Subsection 5 of the same statute provides authority for charitable corporations "To sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets." Thus, the action of CF&S in changing the form of one of its assets was proper pursuant to the authority granted to it as a charitable organization by the State of Rhode Island.

Moreover, the doctrine of *cy pres* is completely inapplicable to the facts in this case. The doctrine of *cy pres* applies where property is given by a donor in trust for a particular charitable purpose and that particular charitable purpose fails or can no longer be carried out. Bogert, *Law of Trusts,* Sec. 147 (Power of Court to Alter Charitable Trusts—Cy Pres Doctrine) (5th ed., 1973). In this situation, the court will ordinarily direct that the

property be given to another charitable organization to carry out a similar charitable purpose or permit the original donee to use it for a similar charitable purpose, IV Scott *Trusts*, Sec. 399 (3rd ed., 1967).

Rhode Island has codified the doctrine of *cy pres* in Section 18-4-1 of the Rhode Island General Laws (1985 Reenactment) which states that *cy pres* is applicable where "the purposes of the donor cannot be literally carried into effect."[20] In this situation, the statute recites, "A complaint may be filed for a *cy pres* application of trust property; and thereupon all such proceedings . . . shall be had and taken in said suit, to carry out the intents of the donor as near as may be, that such charity may not fail," Section 18-4-1 R.I. General Laws (1985 Reenactment) (emphasis added).[21]

As stated in Bogert and Scott as well as the Rhode Island statute, *cy pres* is applicable only in the situation where the charitable purpose and thus the charity itself has failed. The *cy pres* doctrine does not apply where the gift, whether in trust or fee simple, is no longer suitable for use and the charity desires to convert the form of its assets and then use the proceeds of the sale to carry out the charitable intentions of the donor. An illustration of this basic doctrine, involving a charitable trust and a gift in fee simple, is *Town of South Kingston* v. *Wakefield Trust Co.*, 134 A. 815, 48 R.I. 127 (1926). In *Wakefield Trust Co.*, the R.I. Supreme Court held that the *cy pres* doctrine was inapplicable because the charity itself and its charitable purpose had not failed. After years of use, the area surrounding the site of the property became highly developed and was no longer a suitable location for a public school, at which point the town sold the

20. A copy of the Rhode Island *cy pres* statute is attached hereto as R.A-8.

21. The reference by the Petitioners to "[t]he continuing jurisdiction which courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee. . ." (page 24, Petition) completely misstates both *cy pres* doctrine and the court record. The 1951 Rhode Island Superior Court Decree R.A-4) recognized that the original conveyances to Family Services, Inc. were not made in trust. But even if the Lakeside property were held in trust, the Petitioners' reference to "[t]he continuing jurisdiction which courts exercise over charitable gifts" is incorrect. *Cy pres* jurisdiction does not go on forever. The Petitioners appear to be referring to "prerogative *cy pres*," which exists only in England, where it is exercised "comparatively rarely." Bogert, *Law of Trusts*, Sec. 147, p. 525 (5th ed., 1973).

property to a third party. The Court held that *cy pres* was inapplicable because the purpose of the charitable trust had not failed, because the proceeds of the sale could be used to carry out the charitable intention of the donor.

In this matter, unlike *Wakefield Trust Co.*, the property in question is held in fee simple and not as a charitable trust, however, the applicable *cy pres* principle is the same: the doctrine does not apply because CF&S can still carry out the donor's charitable purpose by using the proceeds from the Lakeside sale to benefit children.[22] CF&S has not gone out of business or in any way ceased to fulfill its general charitable purposes of aiding children; it is merely using the proceeds of the sale of one of its assets, namely the Lakeside property, for its ongoing general charitable purposes. The condition precedent for invoking the doctrine of *cy pres*, namely the failure of the charitable purpose, is absent in this matter, and thus, the *cy pres* doctrine is inapplicable whether the Lakeside property is held in trust or in fee simple.[23]

The Petition for Writ of Certiorari must be denied because the granting of Summary Judgment by the R.I. Superior Court, and

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22. CF&S is also not required to obtain the permission of the court to sell the Lakeside property under a Rhode Island statute which allows a trustee to petition the court for instructions before selling real property held pursuant to trust. Section 18-4-1 of the R.I. General Laws (1985 Reenactment) provides that "whenever the sale, exchange, conveyance or leasing of the whole or of any part or parts of any property held upon trust, the R.I. Superior Court, upon complaint, brought by any trustee of any such property, may authorize one or more of such transactions as may appear necessary or expedient." CF&S is not subject to the provisions of this section because the Lakeside property is not held in trust. Even if the property was held in trust, the Rhode Island statute is not mandatory; it merely allows the trustee to petition the court for approval when the trustee is unsure whether the sale of trust assets is appropriate according to the terms of the trust.

23. The Petitioners assert, on page 22 of their Petition for Writ of Certiorari that, "CF&S made repeated admissions of trust title in its August 1987 memorandum" (supporting the CF&S Motion to Dismiss). This assertion is completely false; the Respondents, for purposes of supporting a motion to dismiss for failure to state a claim upon which relief can be granted, must accept as true all material allegations of the complaint. Only for purposes of supporting the Motion to Dismiss did the Respondents "accept" the allegations in the complaint as "true." CF&S's denial of trust title has been consistent throughout entire proceeding.

the affirmance of that judgment by the R.I. Supreme Court, was correct based upon undisputed facts and legal questions which were properly resolved by the trial justice.

IV.

"FINDING" OR "OPINION" BY THE RHODE ISLAND ATTORNEY GENERAL

The Petitioners repeatedly refer to the weight given by the R.I. Supreme Court to the purported "opinion" or "finding" made by the Rhode Island Department of Attorney General with respect to the sale of the Lakeside property by CF&S. The Petitioners assert that they were given no advance notification of the so-called "opinion" of the Rhode Island Attorney General, until it was referred to during oral argument before the R.I. Supreme Court on February 13, 1989.

The Petitioners have made seriously misleading statements to this Court in their characterization of the role of the Rhode Island Department of Attorney General in this case. The Petitioners' headnote for this point disingenuously states the following as a reason for granting the Writ: "Reliance on an Unpublished, Non-record Attorney General's Opinion as Patently Untenable." There is no written or oral opinion by the Attorney General for the simple reason that the Attorney General never rendered any opinion or finding.

The position of the Rhode Island Department of Attorney General has been consistent throughout this case, and that position remains the determination that this matter is a private legal dispute which has no relationship to the Attorney General's preclusive role to enforce charitable trusts. That position was first taken by a representative of the Attorney General at the June 13, 1988 hearing on the Motion to Dismiss.[24] The existence of

24. This was the first public position taken by the Attorney General. Prior to the conveyance by CF&S to respondent Sherry, CF&S informally advised the Attorney General of the impending sale; the Attorney General indicated he had no objection. Similarly, the Petitioners had approached the Attorney General to inquire if the Attorney General would initiate a *cy pres* proceeding or, alternatively, if the Petitioners could institute an action, as relators, in the name of the state. The Attorney General declined the Petitioners' request; thus, the Petitioners were aware of the Attorney General's position in the matter even before commencing their lawsuit.

the position of the R.I. Attorney General did not first "surface" on February 13, 1989 as the Petitioners allege. The Petitioners attempt to seriously mislead the Court by implying that the position of the Department of Attorney General was based on an opinion or finding which they were entitled to discover, when in fact the Petitioners had been personally advised of the Attorney General's position on this matter in a meeting requested by their own representatives, prior to commencement of this action. The Attorney General does not render opinions or findings on matters outside his jurisdiction.

The Department of Attorney General never formally determined that there was no objection to the sale of the Lakeside property for the simple reason that there was never any necessity for the Attorney General to render an opinion. There is no "opinion" or "finding" for the Petitioners to discover. Had the Lakeside property in fact been held in trust, then clearly the Rhode Island Attorney General was the only party who could have initiated legal action to enforce the charitable trust on behalf of the public, *Stearns* v. *The Newport Hospital, supra; Israel* v. *National Board of Y.M.C.A., supra.* The Lakeside property was held in fee simple without any restrictions, and, therefore, there was never any charitable trust which the Attorney General could seek to enforce. Moreover, the doctrine of *cy pres* is inapplicable because there has not been any failure of a charitable trust such that the courts must ascertain the purposes of the settlor in order to effectuate the trust purposes, see, generally, Bogert, *Law of Trusts,* Sec. 147 (Power of Court to Alter Charitable Trusts—Cy Pres Doctrine) (5th ed., 1973).

The Petitioners state that "the Attorney General was given no advance notice of the proposed sale" (page 22, Petition), when in fact there could not have been any conceivable requirement for advance notification of the sale of private property.[25] Section 18-19-5 of the R.I. General Laws requires that "[t]he Attorney General shall be notified of all judicial proceedings involving

25. In fact, as discussed in footnote 24 above, the Attorney General had been informally advised of the impending conveyance from CF&S to the respondent Sherry.

charitable trusts affecting or in any manner dealing with, a charitable trust." This statute, however, applies only to judicial proceedings, not to every sale of property or discretionary action that a charitable organization takes.

The Petitioners refer to six "declarations" and "opinions" which were part of the record or contained in the case law, and which "the Rhode Island Court ignored." The Petitioners' characterization of these matters is grossly misleading and often simply erroneous. There was never any special "board of trustees" appointed by the Providence Society for Organizing Charity to oversee the management of the Lakeside property.

The 1936 opinion of the attorney, George H. Huddy, Jr., was not part of the record below and would clearly have been inadmissible in any circumstances. Neither is there any evidentiary significance to what the Petitioners refer to as "the echoing Society declaration" of 1946 of the then President of the Providence Society for Organizing Charity. Whatever the predecessor charity did with respect to the Lakeside property is not binding on CF&S, a separate entity, which received the property in 1951 "for its general uses and purposes," the classic language used to create a fee simple. The statements contained in memoranda prepared after the initial conveyance to Friends Service, Inc. are of no evidentiary value in determining the intent of the original donors in 1912 and 1916.

The reference by the Petitioners to *Petition of Downer Home*, 226 N.W. 2d 444, 67 Wis. 2d 55 (1975) (page 24, Petition) is completely inapplicable because the *Downer Home* case involved a specific trust where funds had been gathered for a specific purpose. There has never been any trust in regard to the Lakeside property.

The reference by the Petitioners (page 24, Petition) to "[t]he continuing jurisdiction which courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee. . ." is totally irrelevant and misstates *cy pres* doctrine, as is discussed earlier in this brief.

The "declarations" and "opinions" referred to by the Petitioners are either completely inapposite to this case or constitute hearsay and would be clearly inadmissible had there been a trial of this matter.

Accordingly, the Petitioners' characterization of the position of the Rhode Island Attorney General is inaccurate and misleading, and the statement that the Petitioners were caught by surprise by a reference to an opinion of the State Attorney General, is so erroneous that it should be completely disregarded by the Court.

CONCLUSION

The Petition for Writ of Certiorari is entirely without merit and must be summarily denied. The Petitioners failed to allege any federal questions in the state court proceedings and thus are barred from raising them for the first time in the Supreme Court. Furthermore, the Supreme Court lacks jurisdiction in this matter because there are no federal questions properly presented to the Court, nor are there any constitutional issues raised by the Petition.

The question of standing is a threshold barrier which the Petitioners cannot surmount in this case. The "injury" that is alleged is so abstract and speculative that it must fail even under the most expansive interpretations of the "injury in fact" requirement for standing. Failing to meet the threshold constitutional requirements for standing, the only way the Petitioners could successfully maintain this action would be if the Lakeside property was a charitable trust and the Petitioners had a special interest in the trust sufficient to confer standing. In fact, the Lakeside property, as correctly determined by the Rhode Island courts, is not a charitable trust. But, even if it were, the Petitioners could not maintain this action because they lack any special interest in the trust other than as taxpayers or members of the community at large, a generalized interest which is insufficient to confer standing to maintain an action for enforcement of a charitable trust.

The granting of summary judgment by the trial court, and the affirmance of that judgment by the R.I. Supreme Court, was entirely proper in light of the undisputed factual record. Both of the deeds from the original grantors were devoid of any language expressing an intent to impress a trust upon the Lakeside property. The 1951 R.I. Superior Court decree explicitly recognized the absence of any trust, and ordered the Lakeside property to be conveyed to CF&S for its general uses and purposes. The only matters for the trial court to decide involved questions of state law

regarding the inapplicability of the *cy pres* doctrine and all such issues were correctly resolved.

Lastly, the R.I. Supreme Court did not improperly rely on any previously unknown "opinion" or "finding" of the State Attorney General. The position of the Rhode Island Attorney General regarding this case was consistent throughout the entire proceeding and well known to the Petitioners from the outset.

For the foregoing reasons, the Petition for Writ of Certiorari must be summarily denied.

Respectfully submitted,

JAMES H. FALK, SR.
Counsel of Record

CHARLES J. MCGOVERN
BRADFORD A. PENNEY
COFFEY, MCGOVERN AND NOEL LTD.
Counsel for Respondents

August 9, 1989

APPENDIX

R.A-1
(Original)

JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

FRANCIS X. FLAHERTY
MAYOR

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

AUG 1 19[illegible]

This is a True Copy of a/an Deed
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book 72 at Page 115.

Attest: Jennie A. Senerchia
Warwick City Clerk

Know all Men by these Presents,

That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the Highway leading from Rocky Point to Providence, thence N 1°16' W bounding, easterly on said Highway three hundred twenty-one and 9/10 (321.9) feet to a stone bound and land now or lately of George H.Kate; thence, N 89°51'W bounding northerly on said George H.Kate land twenty-one hundred and sixty-eight (2168) feet to Great Pond so-called, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel M.Colburn, thence north 89°15'E bounding southerly on said Colburn's land seventeen and 9/10 (17.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John H.Sweetman, Deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert B.Greene, C.E. Jan. 1869" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same property conveyed to this grantor by deed from Myrna Dean (Hotel Interiors) Dec. 1913 and recorded in said Town in Deed Book 81, at page 114.

To Have and to Hold,

In Testimony Whereof,

KNOW ALL MEN BY THESE PRESENTS:

THAT *I, William H.P. Faunce of the City of Providence in the State of Rhode Island (single),* hereinafter called the Grantor, in consideration of *the sum of Ten (10) Dollars* to *me* paid by *the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein,* hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby acknowledge, do hereby remise, release, and forever QUITCLAIM unto *it* the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns forever, all the right, title, interest, property, claim, and demand, which I now have, or of right ought to have, or claim, in and to

That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N 1° 14' W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80° 51' W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89° 15' E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same preoperty conveyed to this grantor by deed from Pyrce Owen dated February 26th 1912 and recorded in said Town in Deed Book 81, at page 444.

TO HAVE AND TO HOLD, the same, with all the rights, privileges and appurtenances thereunto appertaining, unto and to the use of *it* the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns forever.

And *I* the aforementioned *William H.P. Faunce* for *myself* and for *my* heirs, executors, and administrators, do covenant with the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns that *I* will warrant and defend the aforedescribed premises unto the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and

assigns forever, against the lawful claims and demands of all persons claiming by, through or under *me*.

And I, *Sarah E. Faunce* wife of the said *William H.P. Faunce* in consideration of the sum paid as aforesaid, do hereby release and forever quitclaim unto the said *Providence Society for Organizing Charity, its successors* ~~heirs~~ and assigns, all *my* right of *dower* in and to the aforedescribed premises.

IN TESTIMONY WHEREOF, *we* have hereunto set *our* hands and seals this *31st* day of *October* in the year of our Lord one thousand nine hundred ~~and~~ *twelve (1912)*.

Signed and sealed in presence of)
)
Henry Salomon)

William H.P. Faunce

Sarah E. Faunce

State of Rhode Island.

County of Providence. *In Providence on the 31st day of October A.D. 1912 before me personally appeared the above named grantors William H.P. Faunce and Sarah E. Faunce, his wife, both of them to me known and known by me to be the parties executing the foregoing instrument and severally acknowledged said instrument, by them executed, to be their free act and deed.*

Recorded Nov. 4, 1912 at 8 a.m.

Witness

/S/
James T. Lockwood,
Town Clerk

Notary Public

/S/
Henry Salomon,
Notary Public

R.A-2
(Original)

JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

AUG 1 1986

This is a True Copy of a re[illegible]
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book [illegible] at Page [illegible]

Jennie A. Senerchia
CITY CLERK
WARWICK, RHODE ISLAND

Know all Men by these Presents:

That

hereinafter called the Grantor
in consideration of

to paid by
hereinafter called the Grantee the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and
heirs and assigns forever,

To Have and to Hold, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of the said Grantee and heirs and assigns forever.

And the said Grantor do hereby for and for heirs, executors and administrators, covenant with the said Grantee and heirs and assigns that lawfully seized in fee simple of the said granted premises; that the same are free from all incumbrances that have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and heirs and assigns shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises; and that the said Grantor will, and heirs, executors, and administrators shall, warrant and defend the same to the said Grantee and heirs and assigns forever against the lawful claims and demands of all persons.

And for the consideration aforesaid

do hereby release all right of in and to the said granted premises unto the said Grantee and heirs and assigns forever.

In Witness Whereof, have hereunto set hand and seal this day of
in the year of our Lord one thousand nine hundred and

Signed and sealed in presence of

Patrick St. Patrick (L.S.)

Jeremiah Patrick
Town Clerk

KNOW ALL MEN BY THESE PRESENTS:

THAT *I, Patrick Fitzpatrick of the City of Providence in the State of Rhode Island (single),* hereinafter called the Grantor, in consideration of *the sum of Ten (10) Dollars* to *me* paid by *the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein,* hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and *its successors* ~~heirs~~ and assigns forever, *in fee simple*

That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick, at or near the part called Hoxsie and estimated to contain nineteen and ¼ (19¼) acres more or less, bounding easterly on the Road from Old Warwick to Providence four hundred thirty-one (431) feet more or less, southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty two hundred (2200) feet more or less westerly on Great Pond Brook so called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty two hundred (2200) feet more or less.

Being the same tract so located which formerly belonged to John N.O. Hoxsie and was conveyed by the Administratrix of his estate to this Grantor by deed recorded with the land records of said Town in Deed Book 84 at page 252.

TO HAVE AND TO HOLD, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of said *Grantee,* and *its successors* ~~heirs~~ and assigns forever, *in fee simple.*

And *I* the said Grantor do hereby, for *myself* and for *my* heirs, executors, and administrators, covenants with the said Grantee and *its successors* ~~heirs~~ and assigns that *I am* lawfully seized in fee simple of the said granted premises; that the same are free from all encumbrances that *I* have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and *its successors* ~~heirs~~ and assigns shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises, and that *I* the said Grantor will, and *my* heirs, executors, and administrators shall warrant and defend the same to the said Grantee and *its successors* ~~heirs~~ and assigns forever against the lawful claims and demands of all persons.

~~And for the consideration aforesaid do hereby release all right of in and to the said granted premises unto said Grantee and heirs and assigns forever.~~

IN WITNESS WHEREOF, *I* have hereunto set *my* hand and seal this *29th* day of *February* in the year of our Lord one thousand nine hundred ~~and~~ *sixteen (1916).*

Signed and sealed in presence of) Patrick Fitzpatrick
)
E. Tudor Gross) U.S. Revenue Stamps for $3.50

State of Rhode Island.

County of Providence. In Providence in said County on the 29th day of February A.D. 1916 before me personally appeared the above named Grantor Patrick Fitzpatrick to me known and known by me to be the party executing the foregoing instrument and acknowledged said instrument by him executed to be his free act and deed.

Recorded Mar. 2, 1916 at 8 a.m.

Witness

/s/
James T. Lockwood,
Town Clerk

Notary Public

/s/
E. Tudor Gross,
Notary Public

STATE OF RHODE ISLAND

PROVIDENCE, Sc. SUPERIOR COURT

FAMILY SERVICE, INC.

-v-

WILLIAM E. POWERS, Attorney General of the State of Rhode Island

21550

BILL OF COMPLAINT

FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in Providence, in said State, brings this its bill of complaint against WILLIAM E. POWERS, of Cumberland, in said State, as he is Attorney General of the State of Rhode Island, and for cause of complaint says:

1. That the complainant, Family Service, Inc., was created by act of the General Assembly of the State of Rhode Island passed at the January Session 1898, under the name of Providence Society for Organizing Charity, the name of said complainant being changed to Family Welfare Society of Providence by amendment to its charter duly filed in the office of the Secretary of State on December 31, 1924, and again changed to Family Service, Inc. by amendment to said charter duly filed in the office of the Secretary of State on March 29, 1948. Complainant's corporate purpose as stated in its charter is "organizing charitable work, diminishing pauperism, and improving the condition of the poor."

2. That during the year 1912 persons interested in the work of the Providence Society for Organizing Charity, as complainant was then known, caused certain real estate located in the Town, now the City, of Warwick, Rhode Island, to be conveyed to

, Clerk

the complainant, the deed of such conveyance being made by William H. P. Faunce, grantor, dated October 31, 1912, recorded in the Land Records of said Town of Warwick November 4, 1912, in Deed Book 32 at page 113; the premises conveyed by said deed being therein described as follows:

> That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:
>
> Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°, 14' W. bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°, 51' W. bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn; thence north 89°, 15' E. bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C. E. Jan., 1885," recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

3. That during the year 1916 persons interested in the work of said Providence Society for Organizing Charity caused certain other real estate located in said Town of Warwick to be conveyed to the complainant, the deed of such conveyance being made by Patrick Fitzpatrick, grantor, dated February 29, 1916, recorded in the Land Records of said Town of Warwick March 2, 1916, in Deed Book 92 at page 60; the premises conveyed by said deed being therein described as follows:

> That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick,

lat or near the part called Hoxsie) and estimated to contain nineteen and 1/4 (19 1/4) acres more or less, bounding easterly on the Road from Old Warwick, to Providence four hundred thirty-one (431) feet more or less; southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less; westerly on Great Pond Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

4. That said conveyances to the complainant were not made upon any condition and did not purport to be made upon any trust, but in view of its understanding that many of the persons who contributed the funds necessary to bring about such conveyances were interested in summer camping and similar work for children, complainant, acting through its own committees or divisions, including its committee or division then known as the League for the Suppression of Tuberculosis, used said premises until the year 1918 for summer care of children and the parents of children who were in need of outdoor life but had no transmissible disease. In or about the year 1918 the persons then constituting said League for the Suppression of Tuberculosis were organized as a separate organization under the name Providence Tuberculosis League, and subsequent to 1918 the complainant permitted said premises so conveyed to it (hereinafter sometimes referred to as Lakeside) to be used by said Providence Tuberculosis League for the continued summer care of children, and beginning about 1925 said premises were used by said Providence Tuberculosis League under the provisions of formal leases in which complainant was lessor and Providence Tuberculosis League was lessee, in connection with a program including both summer and all year care of children.

5. That complainant has now been notified by said Providence Tuberculosis League that said League no longer desires

to carry on at said property the work which it has previously carried on, and now proposes to turn over the property heretofore used by it for support of its work at Lakeside to Children's Friend and Service, a charitable corporation of the State of Rhode Island.

6. That complainant's Board of Directors and Board of Real Estate Managers have given careful consideration to the question of the best use to be made of said real estate, having regard to the welfare of the community generally and the carrying out, as near as may be, of the charitable purposes which impelled the contributors above mentioned to bring about the conveyance thereof to the complainant; that the matter has further been considered by the staff and Board of Directors of the Providence Council of Social Agencies and by a special committee appointed by said Council, all of whom have approved the conveyance of said property to Children's Friend and Service, which has for many years been carrying on work with children in this State and which has secured the approval of said Council of Social Agencies to a proposed program under which its administrative officers and the accommodations maintained by it for children will ultimately be centered at Lakeside; that the Board of Directors and Board of Real Estate Managers of complainant, subject to obtaining the authority of this Honorable Court, have approved the conveyance of said Lakeside property to said Children's Friend and Service, to be thereafter held and used by it for its general uses and purposes.

7. That although, as above stated, the conveyances above referred to were not made in trust and no conditions as to the use of or disposal of said Lakeside property were imposed either by the grantors or by the persons who caused said convey-

ances to be made, question may be raised by some person at some future time as to the propriety of the proposed conveyance to Children's Friend and Service.

8. Complainant avers that the only necessary party to this proceeding is the respondent William E. Powers in his capacity as Attorney General representing the people of the State and the public generally, and as such Attorney General charged with general oversight of the administration of charitable trusts.

WHEREFORE, and inasmuch as complainant can have relief only in this Court of Equity, and to the end, therefore, that the respondent may true, direct and perfect answer make to all and singular the matters aforesaid (but not under oath, the benefit of which is hereby expressly waived), and that a decree may be entered authorizing conveyance of said Lakeside property to Children's Friend and Service as above proposed, and that complainant may have such other relief as to this Court shall seem meet and to justice and equity shall appertain;

May it please the Court to grant unto the complainant a writ of subpoena to be directed to said William E. Powers, as he is Attorney General of the State of Rhode Island, commanding him under a certain penalty therein to be named personally to be and appear before this Honorable Court and true, direct and perfect answer make to all and singular the premises, and thereafter to perform and abide by such directions, orders and decrees as to this Court shall seem meet and to equity and good conscience shall appertain.

FAMILY SERVICE, INC.

By _____
President

_____, Clerk

STATE OF RHODE ISLAND

PROVIDENCE, Sc.

In Providence, in said County, on the 14th day of February, A. D. 1951, before me personally appeared Lawrence L. Broughton, who signed the foregoing instrument in behalf of said Family Service, Inc., and made oath that he is President of said Family Service, Inc., and duly authorized to sign said instrument as aforesaid; that the facts stated therein are true, of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

Arthur E. Erickson
Notary Public

R.A. 4
(Original)

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

SUPERIOR COURT

FAMILY SERVICE, INC.

-v-

Eq. No. 21550

WILLIAM E. POWERS, Attorney General of the State of Rhode Island

K.S

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this 16th day of February, A. D. 1951.

By order,

Enter:
Walsh, P.J.
2/16/51

Stephen Lomanno
Asst. Clerk

STATE OF RHODE ISLAND SUPERIOR COURT

PROVIDENCE, So.

FAMILY SERVICE, INC.	:	
-v-	:	Eq. No. 21550
WILLIAM E. POWERS, Attorney General of the State of Thode Island	:	

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the perseons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this *16th* day of February, A.D. 1951.

By order,

Enter:

/s/ Walsh, P.J.
2/6/51

/s/ Stephen (illegible)
Asst. Clerk

R:A-5
(Original)

FRANCIS X. FLAHERTY
MAYOR

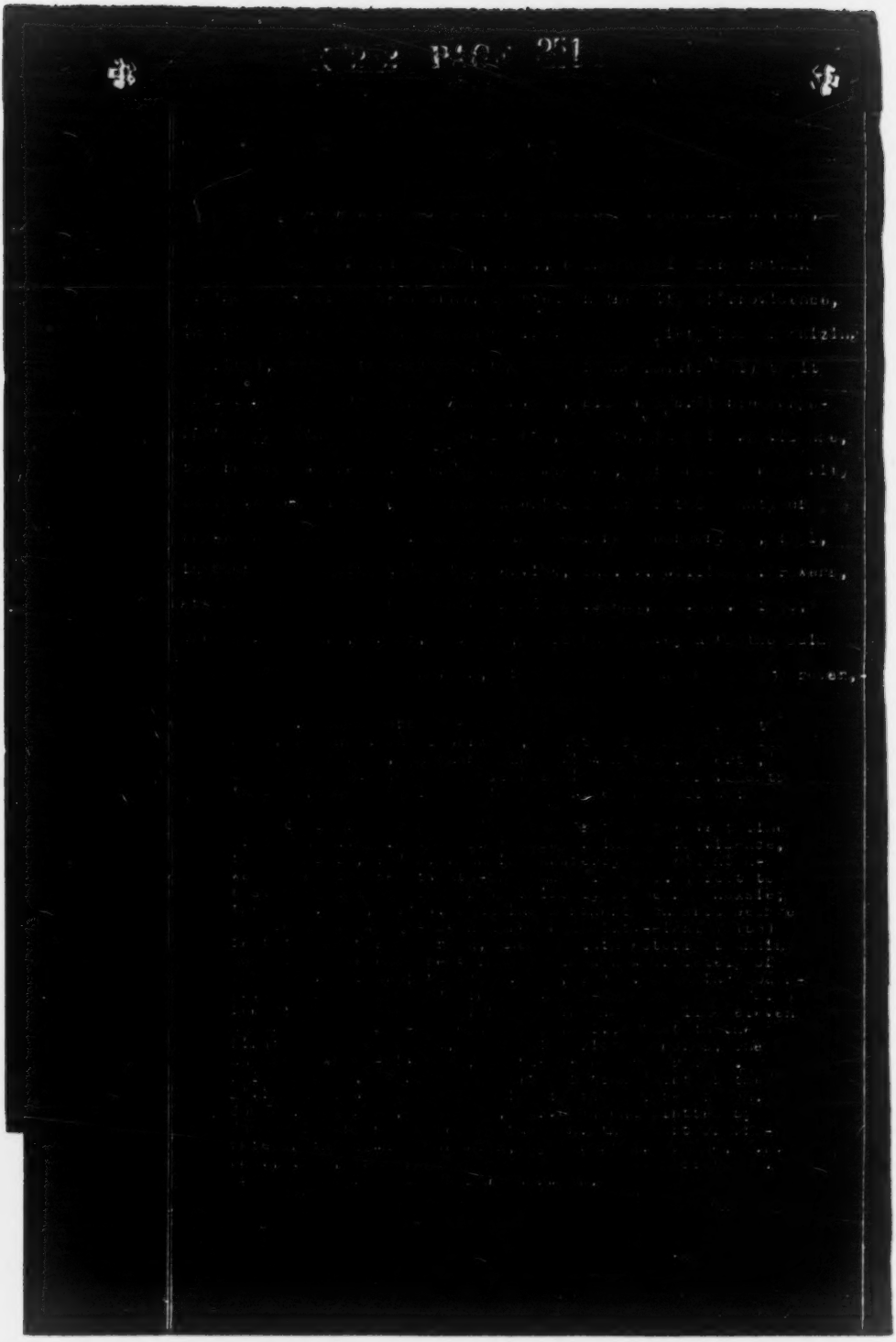
JENNIE A. SENERCHIA
CITY CLERK
(401) 738-2000

CITY OF WARWICK
OFFICE OF THE CITY CLERK
3275 POST ROAD
WARWICK, RHODE ISLAND 02886

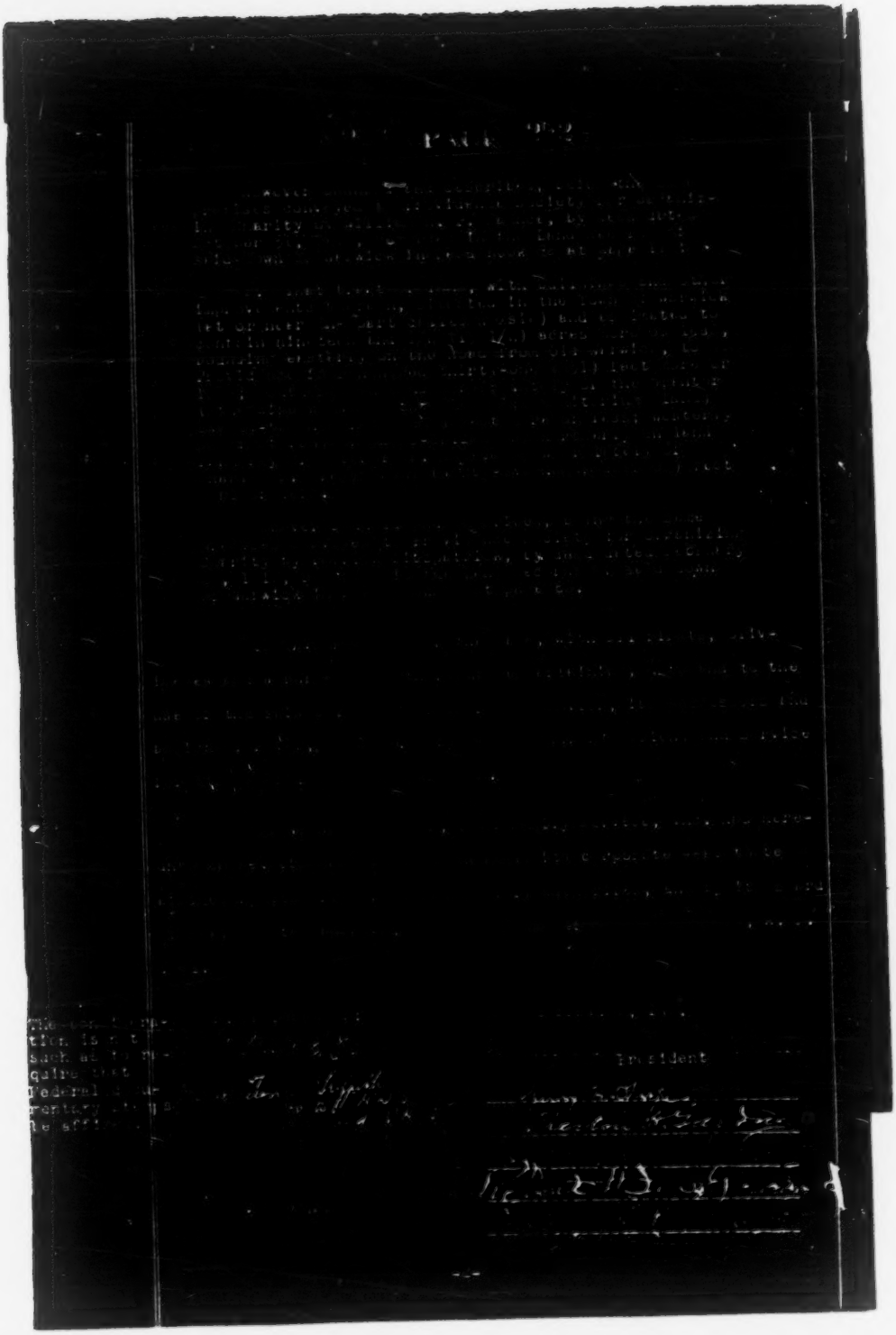
AUG 1 1989

This is a True Copy of a/an Deed
recorded in the records of Land Evidence in the Office of the
City Clerk, City of Warwick, State of Rhode Island
in Book 232 at Page 251.

Attest: Jennie A. Senerchia
Warwick City Clerk



BEST AVAILA



ABLE COPY

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named Knowlton E. Knowlton, to me known and known by me to be the President of, and one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed as such President, and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 26th day of March A. D. 1951, before me personally appeared the within named Henry D. Sharpe, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 28th day of March A. D. 1951, before me personally appeared the within named Preston W. Gardner, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named Clarence H. Schmidt, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

Notary Public

BOOK 2 PAGE 251

STATE OF RHODE ISLAND :
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A. D. 1951, before me personally appeared the within named [illegible], to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

[illegible]
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 9th day of April A. D. 1951, before me personally appeared the within named [illegible], to me known and known by me to be one of the persons executing the foregoing instrument in behalf of Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

[illegible]
Notary Public

Recorded Apr. 9 1951 at 9:09 a m

KNOW ALL MEN BY THESE PRESENTS,

That, FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by CHILDREN'S FRIEND AND SERVICE, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled "Family Service, Inc. v. William E. Powers, Attorney General of the State of Rhode Island, Eq. No. 21550," does hereby give, grant, bargain, sell and convey unto the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever,

1. That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows:

Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°,14' W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence 80° 51' W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89° 15' E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. the Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by William H.P. Faunce, by deed dated October 31, 1912, recorded in the Land Records of said Town of Warwick in Deed Book 82 at page 118.

2. That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxsie) and estimated to contain

nineteen and ¼ (19¼) acres more or less, bounding easterly on the Road from old Warwick, to Providence four hundred thirty-one (431) feet more or less; southerly on land now or lately of the Grantor (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less; westerly on Great Pond Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by Patrick Fitzpatrick, by deed dated February 29, 1916, recorded in the Land Records of said Town of Warwick in Deed Book 92 at page 60.

TO HAVE AND TO HOLD, the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

IN WITNESS WHEREOF, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be affixed by its officer thereunto duly authorized, and by its Board of Real Estate Managers, this *28th* day of *March*, A.D. 1951.

In presence of:

FAMLY SERVICE, INC.

By: /s/ Lauriston E. Knowlton
President

The consideration is not such as to require that Federal documentary stamps be affixed.

Board of Real Estate Managers

/s/ Henry D. Sharp

/s/ Preston H. Gardner

/s/ Clarence H. Philbrick

/s/ Robert H.Ives Goddard

/s/ George H. Huddy, Jr.

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *4th* day of *April* A.D. 1951, before me personally appeared the within named *Lauriston E. Knowlton*, to me known and known by me to be the *President*, of, and one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed as such *President*, and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *28th* day of *March* A.D. 1951, before me personally appeared the within named *Henry D. Sharp*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Nathan D. Goff
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the *28th* day of *March* A.D. 1951, before me personally appeared the within named *Preston H. Gardner*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *Clarence H. Philbrick*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Henry L.P. Beckwith
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *Robert H. Ives Goddard*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

In Providence, in said County, on the 4th day of April A.D. 1951, before me personally appeared the within named *George H. Huddy, Jr.*, to me known and known by me to be one of the persons executing the foregoing instrument in behalf of, Family Service, Inc., and he acknowledged said instrument by him so executed to be his free act and deed and the free act and deed of said Family Service, Inc.

/s/ Illegible
Notary Public

STATE OF RHODE ISLAND
KENT, SC.

SUPERIOR COURT

WARWICK LAND TRUST, INC., PAUL HULING, JEANNE M. FOSTER, EILEEN NAUGHTON and KATHLEEN PREISS

VS.

CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, RHODE ISLAND CENTRAL CREDIT UNION and JOHN DOES, ONE through FIVE

VS.

and JAMES O'NEIL, in his capacity as Rhode Island Attorney General, and SAINT TIMOTHY'S CHURCH CORPORATION, WARWICK and WOLOHOJIAN REALTY CORP.

KC 87-811

J U D G M E N T

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the cy pres doctrine of law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance With Rule 54(b) R.C.P., Judgment for the defendants, Children's Friend and Service, Inc., and R & F Associates

8

on their Motions for Summary Judgment will enter upon the entry of this Judgment, the Court having determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 21st day of July, 1988.

Per Order,

Deputy Clerk

ENTER:

Justice

DATED:

CERTIFICATION

I, the undersigned, hereby certify that I hand delivered a copy of the within Order to the following persons on the 1st day of July, 1988.

Arlene Violet, Esquire
Robert S. Stitt, Esquire
Pearlman & Vogel
750 East Avenue
P.O. Box Drawer 9007
Providence, Rhode Island 02940

Edward Murray, Esquire
Department of Attorney General
72 Pine Street
Providence, Rhode Island 02903

Sanford Resnick, Esquire
250 Centerville Road
Warwick, Rhode Island 02886

Leo T. Connors, Esquire
56 Pine Street
Providence, Rhode Island 02903

Mark C. Hanewich, Esquire
6 Wilkins Drive - Suite 107
Plainville, Massachusetts 02762

Gary R. Pannone, Esquire
Coffey, McGovern & Noel, Ltd.
20 Washington Place
Providence, Rhode Island 02903

William T. Murphy, Esquire
One Turks Head Place
Providence, Rhode Island 02903

Anthony M. Gallone, Esquire
1000 Smith Street
Providence, Rhode Island 02908

1850f

Supreme Court

No. 88-426-Appeal.

Friends of Warwick Pond et al. :

v. :

Children's Friend and Service et al. :

O R D E R

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants, Chidren's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of cy pres the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the cy pres doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda submitted by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the

gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior Court is affirmed and the papers of the case are remanded to the Superior Court.

Entered as an Order of this Court this 23rd day of February 1989.

By Order,

Matthew J. Smith
Clerk

Justice Kelleher did not participate.

CHAPTER 4

POWERS OF FIDUCIARIES

SECTION
18-4-1 Application of cy pres doctrine.
18-4-2 Powers of trustees.
18-4-3 Arbitration.
18-4-4 Power of sale.
18-4-5 Effect of trustee's receipt.
18-4-6 Conveyance by infant trustee.
18-4-7 Disposition of money payable to infant trustee.
18-4-8 Settlement of debts and claims — Assent of court.
18-4-9 Powers of surviving fiduciaries.
18-4-10 Management powers exercised with court approval.
18-4-11 Purposes for which borrowing authorized.
18-4-12 Leases authorized.
18-4-13 Parties to management proceedings — Guardians ad litem — Costs.
18-4-14 Binding effect of authorized transactions.
18-4-15 Definitions.
18-4-16 Payments or transfers to fiduciaries — Effect of misapplication by fiduciary.
18-4-17 Transfer of negotiable instrument by fiduciary.
18-4-18 Check drawn by fiduciary payable to third person.
18-4-19 Check drawn by and payable to fiduciary.
18-4-20 Deposit in name of fiduciary.
18-4-21 Deposit in fiduciary's personal account.
18-4-22 Administration of trusts.
18-4-23 Charitable remainder trusts.
18-4-24 Termination of Small Trusts.
18-4-25 Consolidation or division of trusts.

18-4-1. Application of cy pres doctrine. — In all cases of charitable gifts of real or personal estate, whether by deed or will, where the purposes of the donor cannot be literally carried into effect, a complaint may be filed for a cy pres application of the trust property; and thereupon all proceedings, orders, and decrees shall be had and taken in the suit, to carry out the intents of the donor as near as may be, that the charity may not fail, and to this end application as aforesaid may be made in the same complaint for appointment of a new trustee or trustees under or pursuant to the provisions of §§ 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court.

History of Section.
G.L. 1896, ch. 208, § 9; G.L. 1909, ch. 259, § 9; G.L. 1923, ch. 303, § 9; G.L. 1938, ch. 487, § 1; G.L. 1956, § 18-4-1.

Reenactments. The 1988 Reenactment P.L. 1988, ch. 84, § 1) made a punctuation change near the middle of the section; substituted "a new trustee" for "new trustee" near the end of the section; and made several substitutions for the words "said" and "such" throughout the section.

Comparative Legislation. Powers of trustees:

Conn. Gen. Stat. §§ 45-100d — 45-100g.

Mass. Ann. Laws ch. 203, §§ 4A, 4B, 14A, 16-39.

No. 89-31

Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

FRIENDS OF WARWICK POND AND HOXSIE also WARWICK LAND TRUST, PAUL HULING, JEANNE M. FOSTER, EILEEN NAUGHTON and KATHLEEN PREISS,

Petitioners,

v.

CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, RHODE ISLAND CENTRAL CREDIT UNION and JOHN DOES, ONE through FIVE,

Respondents,

and JAMES E. O'NEIL, in his capacity as ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND,

Additional Party-Respondent.

BRIEF OF RESPONDENT JAMES E. O'NEIL, in his capacity as ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

JAMES E. O'NEIL
Attorney General
of the State of Rhode Island

RICHARD B. WOOLLEY
Assistant Attorney General
72 Pine Street
Providence, Rhode Island
02903
(401) 274-4400
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THIS PETITION SHOULD BE DENIED FOR FAILURE TO RAISE A FEDERAL QUESTION OR CONSTITUTIONAL ISSUE BEFORE THE STATE COURT.

II. WHETHER PETITIONERS HAVE STANDING TO BRING THIS ACTION.

III. WHETHER PETITIONERS SHOULD BE SANCTIONED FOR FILING A FRIVOLOUS PETITION.

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No. 89-31

In The

Supreme Court of the United States

October Term, 1989

FRIENDS OF WARWICK POND AND HOXSIE also WARWICK LAND TRUST, PAUL HULING, JEANNE M. FOSTER, EILEEN NAUGHTON and KATHLEEN PREISS,

Petitioners,

v.

CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, RHODE ISLAND CENTRAL CREDIT UNION and JOHN DOES, ONE through FIVE,

Respondents,

and JAMES E. O'NEIL, in his capacity as ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND,

Additional Party-Respondent.

BRIEF OF RESPONDENT JAMES E. O'NEIL, in his capacity as ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

CITATION TO OPINION BELOW

The decision and order of the Rhode Island Supreme Court (unreported) is reproduced in the Respondent, Attorney General James E. O'Neil's, appendix. (R.A. 1-3). The decision and judgment of the Rhode Island Superior Court (also unreported) is reproduced in the Respondent, Attorney General James E. O'Neil's, appendix. (R.A. 4-5).

The Rhode Island Supreme Court denied Petitioners' appeal in *Friends of Warwick Pond v. Children's Friend and Service, Inc.*, C.A. No. 88-426, on February 23, 1989 and also denied Petition for Reargument on March 13, 1989.

JURISDICTION

Respondents assert that Petitioners have failed to raise a federal question or constitutional issue as a basis for their Writ of Certiorari and as such, they are improperly before this Court.

STATEMENT OF THE CASE

This is not a class action suit as represented in Petitioners' brief. This matter rests on a Summary Judgment granted to Respondents by the Rhode Island Courts for lack of standing by Petitioners, as well as a lack of subject matter.

Petitioners attempted to challenge Respondents' deeds, through the application of the Doctrine of Cy Pres, for a transfer of real estate clearly within the discretion of

the Respondents. Title in the entire claim evidences transfers in fee simple without restriction. (R.A. 8-16). The Rhode Island Superior Court judge granted Summary Judgment and specifically held that there was no cy pres application warranted. (R.A. 4-5). The Rhode Island Supreme Court directed in a show cause order for dismissal (R.A. 6-7) that the parties answer three (3) questions as to why the appeal should not be summarily decided. Petitioners and Respondents submitted briefs and argued to the Supreme Court. The Court concluded that cause had not been established and that Petitioners had no standing to bring the complaint, and thus, denied the appeal and affirmed the Superior Court Judgment.

It should be further observed that Petitioners removed two (2) Respondents from this case, namely, St. Timothy's Church Corporation (Warwick) and Woloohojian Realty Corporation, by filing Petitioners' Rule 19.6 Notice. (R.A. 17). These two aforementioned Respondents hold title to their respective property out of the same chain of title involving "Lakeside", the subject property. St. Timothy's Church Corporation acquired its parcel from Respondent, Children's Friend and Service, Inc., after Children's Friend and Service, Inc. acquired the entire tract of land in 1951. Woloohojian Realty Corporation acquired its parcel from St. Timothy's Church Corporation on a subdivision.

Petitioners fail to represent this information in the body of their brief. Instead they inform the Court through an independent Notice of No Interest. Petitioners' position of acquiescence in the title to these two Respondents proves validity of title in Respondent Children's Friend and Service, Inc.

ARGUMENT

I. THIS PETITION SHOULD BE DENIED FOR FAILURE TO RAISE A FEDERAL QUESTION OR CONSTITUTIONAL ISSUE BEFORE THE STATE COURT.

It is a rule of the United States Supreme Court that jurisdiction will not be granted if a federal question or constitutional issue is not raised in the State Court. In *Webb v. Webb*, 451 U.S. 493 at 495 this Court held that:

> "Because this case comes to this court from state court, the relevant jurisdictional statute is 28 U.S.C. at 1257. As applied to the circumstances of this case, the statute requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to have this court enforce. 28 U.S.C. at 1257(3). Similarly our rule 21.1(h) requires the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

Petitioners failure to allege a federal question arises from its absence in the case. This matter involves the transfer of real estate to a non-business corporation, Respondent Children's Friend and Service, Inc., and thence to private persons. Petitioners object to the fact that Respondent, Children's Friend and Service, Inc., decided to sell property it owned and was free to sell.

The Rhode Island Superior Court allowed Petitioners ample opportunity to demonstrate that they had standing. This they failed to do. The deeds in question conveyed absolute title in fee simple with no trust application nor a restrictive hold on the use of the title. Therefore, there was no need to utilize cy pres to accomplish a transfer of title. Petitioners have not been denied due process nor equal protection and the Petitioners have no claim to this title under any circumstances.

Petitioners failed to raise any federal or constitutional issue at any stage before the Rhode Island Courts. Rather, Petitioners attempt to "federalize" state rules of procedure in order to create their forum.

II. PETITIONERS HAVE NO STANDING TO BRING THIS ACTION.

Petitioners have inaccurately asserted that they have standing to contest the sale of real property by a charitable trust. While Respondent, Children's Friend and Service, Inc., is not a charitable trust, even if it were, only the Attorney General would have standing to review its actions. *Israel v. National Board of Y.M.C.A.*, 117 R.I. 614, 618, 369 A.2d 646, 649 (1977); *Accord, Leo v. Armington*, 74 R.I. 124, 59 A.2d 371 (1948); *Newport Hospital v. Harvey*, 47 R.I. 382, 383, 133 A. 648 (1926).

Petitioners' reliance on these cases is misplaced. In *Israel*, the Rhode Island Supreme Court restated the general rule of law that:

> "It is well settled in this state and elsewhere that the attorney general is the representative of the interests of beneficiaries and the public under

> charitable trusts and bequests for charitable uses and that he should be made a party in any suit in which the existence or validity of such a trust or such a bequest is really in question or the administration of such a trust is involved."

Id. at 649.

Petitioners have stated at page 3 of their Petition that this is a class action. There has been no class of individuals established which has sustained injury due to this transfer of real estate. This is nothing more than an attempt by Petitioners to conceal their actual purpose, which is to prevent the construction of residential homes in their neighborhood.

Respondent, Children's Friend and Service, Inc., a Rhode Island non-business corporation, owned the subject real property in fee simple. With such an interest, Children's Friend and Service, Inc. was free to dispose of this property without the interference of the Attorney General or anyone else.

Children's Friend and Service, Inc. is not a charitable trust, but even if it were the Attorney General has no power to review each transfer of real estate absent evidence of wrongdoing or violation of fiduciary duty. The law presumes an exercise of sound discretion by the duly appointed trustee or trustees. While pursuant to R.I. Gen. Laws § 18-9-9 "The Attorney General may investigate at any time charitable trusts for the purpose of determining and ascertaining whether they are being administered in accordance with law and with the terms and purposes thereof", there was no need to investigate Children's Friend and Service, Inc. because this Respondent was simply transferring property in which it had a fee simple

interest. This is the position taken by Respondent, Attorney General James E. O'Neil, during oral argument before the Rhode Island Supreme Court after Associate Justice Murray queried whether the Attorney General had prior knowledge of this real estate transfer. This stated position during oral argument is presumably the "Attoreny General's opinion" referred to by Petitioners in their brief at page 22. There was no formal Attorney General's Opinion nor a "phantom document" as alleged. The Attorney General is simply not empowered to represent a private party's interest in a title dispute.

Petitioners allege that they brought suit to prevent serious monetary, recreational and environmental damage to their homes and their community, but there is no relationship between Petitioners and "Lakeside".

Finally, Petitioners' reliance on *Sierra Club v. Morton, Secretary of the Interior,* 504 U.S. 727 (1972) at page 13 of their brief, is misplaced. There the property was used almost exclusively for recreational purposes. The District Court granted a preliminary injunction, the Ninth Circuit reversed that decision stating that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of (the Respondents) other than the fact that the actions are personally displeasing or distressful to them".

The Rhode Island Supreme Court in *Matunuck Beach Hotel, Inc. v. Sheldon,* 399 A.2d 489 (R.I. 1979) indicated that in order to establish standing, a party has to show injury. The simple fact is that Petitioners have failed to establish that they had any right or interest in and to the

land in question and as such, they lack standing to bring this matter.

III. PETITIONERS SHOULD BE SANCTIONED FOR FILING A FRIVOLOUS CLAIM

The Respondent, Attorney General James E. O'Neil, herein respectfully requests that sanctions be imposed against Petitioners for willful interference with Respondent, Children's Friend and Service, Inc.'s, right to alienate property and to put the proceeds of any such sale towards the general purposes of that organization. The Attorney General is under no statutory mandate and has no ethical responsibility to review real estate transactions made by non-business corporations. This matter presently before the Court presents no federal question and Petitioners make misrepresentations as to the actions of the Attorney General regarding his role in protecting the rights of charitable beneficiaries throughout the State of Rhode Island.

CONCLUSION

For the above reasons, the Respondent James E. O'Neil, in his capacity as Attorney General of the State of Rhode Island, respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

STATE OF RHODE ISLAND

By Its Attorney,

JAMES E. O'NEIL, ATTORNEY GENERAL FOR THE STATE OF RHODE ISLAND

RICHARD B. WOOLLEY
Assistant Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400
Attorneys for Respondent

APPENDIX

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
NO. 88-426-APPEAL.

PROVIDENCE SC

FRIENDS OF WARWICK POND ET AL.,

V.

CHILDREN'S FRIEND AND
SERVICE ET AL.

ORDER

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants, Children's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of *cy pres* the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the *cy pres* doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda submitted by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior Court is affirmed and the papers of the case are remanded to the Superior Court.

Entered as an Order of this Court this 23rd day of February 1989.

By Order,

/s/ ILLEGIBLE
MATTHEW J. SMITH
Clerk

Justice Kelleher did not participate.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
No. 88-426-A.

PROVIDENCE SC

FRIENDS OF WARWICK POND
ET AL.

v.

CHILDREN'S FRIEND
AND SERVICE, ET AL.

ORDER

The petition to reargue is denied.

Justice Kelleher did not participate.

Entered as an Order of this Court this 13th day of March 1989.

By Order,

/s/ ILLEGIBLE
MATTHEW J. SMITH
Clerk

State of Rhode Island
Kent, SC.

Superior Court
KC 87-811

WARWICK LAND TRUST, INC.,
PAUL HULING, JEANNE M. FOSTER,
EILEEN NAUGHTON AND KATHLEEN PREISS,

V.

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION
AND JOHN DOES, ONE THROUGH FIVE,

V.

AND JAMES O'NEIL, IN HIS CAPACITY AS
RHODE ISLAND ATTORNEY GENERAL, AND
SAINT TIMOTHY'S CHURCH CORPORATION,
WARWICK AND WOLOOHOJIAN REALTY CORP.

JUDGMENT

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the *cy pres* doctrine of

law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance with Rule 54(b) R.C.P., Judgment for the defendants, Children's Friend and Service, Inc., and R&F Associates on their Motions for Summary Judgment will enter upon the entry of this Judgment, the Court having determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 1st day of July, 1988.

Per Order,

/s/ ANTHONY PICCIRELLI
ANTHONY PICCIRELLI
Deputy Clerk

Enter:
/s/ BOURCIER, J.
BOURCIER, J.
Justice

DATED: JULY 1, 1988

FILED 1988 JULY 1, 10:11 A.M.
KENT SUPERIOR COURT
ERNEST W. REPOSA, Clerk

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT
NO. 88-426-APPEAL.

PROVIDENCE SC

FRIENDS OF WARWICK POND ET AL.

v.

CHILDREN'S FRIEND AND
SERVICE ET AL.

ORDER

This case came before a single justice of this court for a prebriefing conference in accordance with Rule 16(h) of the Rules of Appellate Procedure. The plaintiffs appeal from a summary judgment entered in the Superior Court in favor of the defendants.

After discussing the issues with counsel and examining the pre-briefing statements filed by the parties, the justice enters the following order.

1. All parties are directed to appear before this court or a hearing panel thereof on a date to be selected in order to show cause why the issues raised by this appeal should not be summarily decided. These issues include without limiting the generality of the foregoing;

   (a) whether a question of fact exists which should have precluded the entry of summary judgment,

   (b) whether the trial justice erred as a matter of law in granting summary judgment even if

no question of fact was disclosed on the record,

(c) whether the plaintiffs had standing to challenge the conveyances,

(d) whether issues presented by the parties have been preserved for appellate review.

2. The plaintiffs may file a supplemental memorandum not exceeding fifteen (15) pages in length on or before January 16, 1989. Thereafter, defendants may file supplemental memoranda not exceeding fifteen (15) pages in length on or before February 7, 1989. Defendants may file separate memoranda or may join in one or more memoranda as they see fit. In the event that plaintiffs wish to reply to defendants' memoranda, application will be made for permission to do so.

3. Plaintiffs, by reason of intervening equities do not challenge the conveyances made to St. Timothy Church Corporation (Warwick) and thereafter the conveyance by St. Timothy Church Corporation (Warwick) to Woloohojian Realty Corp.

Entered as an Order of this Court this 29th day of November 1988.

By Order,

_____

Clerk

Enter:
/s/ WEISBERGER, J.
WEISBERGER, J.

November 29, 1988

Know all Men by these Presents,

That I, William H. P. Faunce of the City of Providence in the State of Rhode Island in consideration of the sum of ten ($10) dollars to me paid by The Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein the receipt whereof is hereby acknowledged, do hereby remise, release, and forever QUITCLAIM unto it the said Providence Society for Organizing Charity, its successors, Heirs, and Assigns forever, all the right, title, interest, property, claim and demand, which I now have, or of right ought to have, or claim, in and to that certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property" comprising the land and all buildings and improvements thereon, the said land being described as follows: Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N 1°14'W bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°51'W bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W. Colburn, thence north 89°15'E bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less, Being Lot No. 5 (five) on plat

entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. The Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan. 1883" recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

Being the same property conveyed to this grantor by deed from Pyrce Owen dated February 26th, 1912 and recorded in said Town in Deed Book 81, at page 444.

To Have and to Hold, the same, with all the rights, privileges and appurtenances thereunto appertaining, unto and to the use of it the said Providence Society for Organizing Charity, its successors and assigns forever.

And I the aforenamed William H. P. Faunce for myself and for my heirs, executors and administrators, do covenant with the said Providence Society for Organizing Charity, its successors and assigns, that I will warrant and defend the aforedescribed premises unto the said Providence Society for Organizing Charity, its successors and assigns forever, against the lawful claims and demands of all persons claiming by, through or under me.

And I, Sarah E. Faunce, wife of the said William H. P. Faunce, in consideration of the sum paid as aforesaid, do hereby release and forever quitclaim unto the said Providence Society for Organizing Charity, its successors and assigns, all my right of dower in and to the aforedescribed premises.

In Testimony Whereof, we have hereunto set our hands and seals this 31st day of October in the year of our Lord one thousand nine hundred and twelve (1912).

Signed and sealed in presence of

/s/ Henry Solomon
State of Rhode Island

/s/ William H. P. Faunce
/s/ Sarah E. Faunce

County of Providence. In Providence on the 31st day of October A.D. 1912 before me personally appeared the above named grantors William H. P. Faunce and Sarah E. Faunce, his wife, both of them to me known and known by me to be the parties executing the foregoing instrument and severally acknowledged said instrument, by them executed, to be their free act and deed.

Recorded Nov. 1, 1912 at 8 a.m.

Witness:

/s/ James T. Lockwood
Town Clerk

/s/ Henry Solomon
Notary Public

Know all Men by these Presents;

That I, Patrick Fitzpatrick of the City of Providence on the State of Rhode Island (single) hereinafter called the Grantor, in consideration of the sum of Ten (10) Dollars to me paid by the Providence Society for Organizing Charity, a corporation established under the laws of the State of Rhode Island and located in the City of Providence therein, hereinafter called the Grantee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Grantee and its successors and assigns forever, in fee simple, That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxie) and estimated to contain nineteen and 1/4 (19 1/4) acres more or less bounding easterly on the Road from Old Warwick to Providence for hundred thirty-one (431) feet more or less southerly on land now or lately of the Grantee (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less westerly on Great Pond Brook so called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

Being the same tract so located which formerly belonged to John N. O. Hoxsie and was conveyed by the Administratrix of his estate to this Grantor by deed recorded with the land records of said Town in Deed Book 84 at page 252.

To Have and to Hold, the aforegranted premises, with all the privileges and appurtenances thereunto belonging, unto and to the use of the said Grantee, and its successors and assigns forever, in fee simple.

And I, the said Grantor do hereby, for myself and for my heirs, executors, and administrators, covenant with the said Grantee and its successors and assigns that I am lawfully seized in fee simple of the said granted premises; that the same are free from all incumbrances, that I have good right, full power, and lawful authority to sell and convey the same in manner as aforesaid; that the said Grantee and its successors and assigns shall by these presents at all times hereafter peaceably and quietly have and enjoy the said premises, and that I the said Grantor will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Grantee and its successors and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof, I have hereunto set my hand and seal this 29th day of February in the year of our Lord one thousand nine hundred and sixteen (1916).

Signed and sealed in presence of

/s/ E. Tudor Gross
State of Rhode Island

/s/ Patrick Fitzpatrick
U.S. Revenue Stamps
for $3.50

County of Providence. In Providence in said County on the 29th day of February A.D. 1916 before me personally appeared the above named Grantor Patrick Fitzpatrick to me known and known by me to be the party executing foregoing instrument and acknowledged said instrument by him executed to be his free act and deed.

Recorded Mar. 2, 1916 at 8 a.m.

Witness,

/s/ James T. Lockwood
Town Clerk

/s/ E. Tudor Gross
Notary Public

BOOK 232 PAGE 251

KNOW ALL MEN BY THESE PRESENTS,

That FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by CHILDREN'S FRIEND AND SERVICE, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled *"Family Service, Inc. v. William E. Powers, Attorney General of the State of Rhode Island,* Eq. No. 21550" does hereby give, grant, bargain, sell and convey unto the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever,

1. That certain estate situated on Rocky Point Road, in the town of Warwick, County of Kent and State of Rhode Island, known as "Lake View Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:

Beginning at a granite bound set in the west line of the highway leading from Rocky Point to Providence, thence N. 1°, 14' bounding easterly on said highway three hundred twenty-one and 5/10 (321.5) feet to a stone bound and land now or lately of George Hoxsie; thence N. 80°, 51'W. bounding northerly on said George Hoxsie land twenty-one hundred and sixty-eight (2168) feet to Great Pond Brook, thence southeasterly bounding on said Brook and Great Pond to land now or lately of Isabel W.

Colburn; thence N. 89°, 15′ E. bounding southerly on said Colburn's land seventy-two and 9/10 (72.9) feet to a granite bound; thence in the same line eleven hundred and forty-one and 1/10 (1141.1) feet to the first mentioned bound, containing fifteen acres, one hundred twenty-six rods, be the same more or less. Being Lot No. 5 (five) on plat entitled "Plat of the Division of Woodland belonging to the Estate of Hon. John R. Waterman, deceased, surveyed and platted by Commissioners appointed by the Hon. The Court of Probate of the Town of Warwick, by Robert W. Greene, C.E. Jan., 1883," recorded on page 47 of Book of Plats No. 2 of the land records of said Warwick.

BOOK 232 PAGE 252

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by William H. P. Faunce, by deed dated October 31, 1912, recorded in the Land Records of said Town of Warwick in Deed Book 82, at page 118.

2. That tract of land, with buildings and other improvements thereon, situated in the Town of Warwick (at or near the part called Hoxie) and estimated to contain nineteen and 1/4 (19 1/4) acres more or less, bounding easterly on the Road from Old Warwick, to Providence four hundred and thirty-one (431) feet more or less; southerly on land now or lately of the Grantor (otherwise known as the "Lakeside Sanitorium" land) twenty-two hundred (2200) feet more or less; westerly on Great Pond

Brook so-called and northerly on land formerly of Cottrell F. Hoxsie (now or lately of Charles F. Frey) about twenty-two hundred (2200) feet more or less.

However bounded and described, being the same premises conveyed to Providence Society for Organizing Charity by Patrick Fitzpatrick, by deed dated February 29, 1916, recorded in the Land Records of said Town of Warwick in Deed Book 92 at page 60.

To have and To Hold the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said Children's Friend and Service, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

In Witness Whereof, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be affixed by its officer thereunto duly authorized, and by its Board of Real Estate Managers, this 28th day of March, A.D. 1951.

The consideration is not such as to require that Federal documentary stamps be affixed.

In presence of:

Arthur E. Erickson
Allen W. Griffiths
As to H.D.S. and P.H.G.
Henry L. P. Beckwith
As to C.H.P.
David L. Illegible
As to D.H.I.G.
Robert E. Illegible

Family Service, Inc.
By Lauriston E. Knowlton
President
Board of Real Estate
Managers
Henry D. Sharpe
Preston H. Gardiner
Clarence H. Philbrick
Robert H. Ives Goddard
George H. Huddy, Jr.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
ALSO WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON AND
KATHLEEN PREISS,
PETITIONERS,
V.
CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R&F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION AND
JOHN DOES, ONE THROUGH FIVE,
RESPONDENTS,
AND JAMES O'NEIL, IN HIS CAPACITY AS
RHODE ISLAND ATTORNEY GENERAL
ADDITIONAL PARTY – RESPONDENT

PETITIONERS' RULE 19.6 NOTICE

SIRS:

PLEASE TAKE NOTICE that, in petitioners' belief, Saint Timothy's Church Corporation (Warwick) and Woloohojian Realty Corp., both additional parties below, have no interest in the outcome of the petition herein.

Dated: June 19, 1989 /s/ ROBERT S. STITT

ROBERT S. STITT
Counsel of Record
PEARLMAN, VOGEL & VIOLET
Blackstone Boulevard Terrace
P.O. Drawer 9007
Providence, RI 02940
(401) 726-6200
Attorneys for Petitioners

No.89-31

AUG 24 1989
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Reply Brief In Support Of A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

ROBERT S. STITT
(Counsel of Record)
PEARLMAN, VOGEL & VIOLET
Blackstone Boulevard Terrace
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Providence, RI 02940
(401) 726-6200
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-31

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Reply Brief In Support Of Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Rhode Island

Petitioners reply to the respondents R&F Associates and Rhode Island Central Credit Union's brief in opposition received by mail on July 31, 1989*. No other respondents' briefs have been received.

Respondents' Overall Strategy

Even after a thirty day, July 3, 1989 extension to complete their research of the "several issues" raised by the petitioners and permit the preparation of a "coordinate[d]" response "in consideration with the other Respondents" (Extension Petition pars. 2 and 4) R&F (and

*Although dated "July 10, 1989" said respondents' brief was timely served within a thirty day time extension granted by order dated July 3, 1989.

its banker) offers nothing more than irrelevant technicality, murky obfuscation and bizarre vituperation*. Only R&F has filed a response to the plaintiffs' June 10, 1989 petition. Children's Friend and Service ("CF&S") and the Rhode Island Attorney General remain silent. The apparent tactic is to let R&F file the response but say nothing about (1) CF&S' damning, still unexplained, trust title admissions and its incomplete, censored, contemporaneous corporate minutes and (2) the R.I. Attorney General's late surfacing, still missing, "opinion(s)". (See petition for certiorari, 3n, 6-7, 13, 20-25).

THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

It is disingenuous for respondents to say that the petitioners should be denied relief for alleged failure to raise federal questions. This case turns on state adopted Federal rules and case law — *res judicata; res judicata* and subject matter/fundamental jurisdiction; standing; Federal Rule 56 and summary judgment decisions. (Plaintiffs' petition, 9n) Indeed, it was the respondents themselves, through their R.I. (Federal) Rule 56 summary judgment motion(s) who raised them. All were briefed and re-briefed below, respondents contrary assertions notwithstanding. (See plaintiffs' petition 2, 6, 7-9, 9n, 11-14, 18, 19-22, 25 and 28)

Going beyond those federal questions (petition 25-27), the Court should also summarily remand, for completion of petitioners' interrupted discovery, because of the plain error below in breach of federal constitutional standards. (Petition 27-28) These breaches were three in number (1) standing (Petition 16-17, 25); (2) the Attorney General's non-record "opinion" (Petition 9-10, 22-25); and (3) the lower courts' handling of Rule 56 summary judgment (Petition 18-22, 28). Thus, *Webb v Webb*, 451 U.S. 493 (1981), respondents' brief pp. 7-8, can give them no help in this case. As Justice Powell, joined by Justice Brennan, noted in his concurring opinion (*Webb, supra* at 502):

> "I join the Court's opinion with the understanding, however, that the broad statements in it are not to be taken as departing from the rule, reaffirmed just this Term, that the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood v. Georgia*, 450 US 261, 265, n 5, 67 L Ed 2d 220, 101 S Ct 1097 (1981). See also *Vachon v. New Hampshire*, 414 US 478, 38 L

*See page 6, *infra*.

Ed 2d 665, 94 S Ct 664 (1974) (finding plain error in an appeal from a state court)."

DENYING PETITIONERS' STANDING WAS PATENTLY UNTENABLE

While devoting considerable space to Rhode Island adopted federal injury-in-fact standing law (Respondents' brief 9-14; plaintiffs' petition 6, 9n, 12, 13-17) the respondents make no mention of the petitioners' uncontradicted claims and proof of such injury. (Petition 4, 7, 9, 11-12, 13-14, 16; Petitioners' Appendix 23-29)

Similarly, while arguing the proposition that only the Attorney General may sue to enforce a charitable trust (Brief 9, 11-12), the respondents make no mention of the four prior R.I. Supreme Court decisions, spanning 50 years (1926-1977) and a 1956 R.I. Statute — all demonstrating that the Attorney General is *not* the sole person who may sue and that notice and participation opportunity, which the petitioners have duly given, is sufficient. (Petition 14-16; P.A. 6).*

Respondents purport to have given more attention to the standing issue than they really did. For example, a good number of the decisions noted under standing at pages 13-14, actually pertain, not to standing, but to other issues herein, i.e. summary judgment**, *res judicata* and other subject matter/fundamental jurisdiction***, and basic due process.****

RULE 56 SUMMARY JUDGMENT WAS PATENTLY UNTENABLE

Respondents' treatment of this issue (plaintiffs petition 17-22) is also largely obfuscation. The Court will find no mention of Lakeside's 1912-16 acquisition with funds specially solicited from community members in aid of pre-existing charitable programs (petition 4, 7, 9, 19, 23); the initial charitable holder's repeated recognition of its resultant charitable trust duties (petition 4, 7, 9, 19, 23-24); the fact that the R.I. Supreme Court's 1951 *cy pres* decree represents a deter-

*A 1905 decision, *Stearns v The Newport Hospital*, 27 R.I. 309 62 A 132 (Respondents' brief 17) has no application. (Petition 15n). *McCarthy v McAloon*, 79 R.I. 55, 83 A.2d 75 (1951) has no application when injury is demonstrated. *See, Roch v Garrahy*, 419 A.2d 827 (R.I. 1980) at 829-31.

**Adickes v S.H. Kress & Co.*, 398 U.S. 144 (1970); petition 19, 22;

***Bradley v Fisher*, 80 U.S. 335 (1872); *Stump v Sparkman*, 435 U.S. 349 (1978); petition 18.

****Goldberg v Kelly* 397 U.S. 254 (1970); *Greene v McElroy*, 360 U.S. 474 (1959); petition 23, 28

mination that Lakeside was held upon charitable trust (petition 4-5, 17-18; respondents' brief 15); CF&S' repeated admissions of trust title in its initial August 1987 memorandum or its clumsy, transparent 1988 efforts to withdraw them (petition 6-7, 20-21; P.A. 30-31 and 42-44); and respondents' resistance to petitioners' outstanding discovery, including a pending motion to compel production of complete unexpurgated copies of CF&S' contemporaneous 1950-51 director's minutes* (petition 6-7, 18-22).

Without mentioning *Hartt v Hartt*, 397 A.2d 518 (R.I. 1979) and *State v Souza*, 456 A.2d 775 (R.I. 1983) adopting the federal *res judicata*, subject matter/fundamental jurisdiction law of *Bradley v Fisher* and *Stump v Sparkman, supra*** (Petition 18), respondents try to by-pass this sticky wicket by pointing to *Taviera v Solomon*, 528 A.2d 1105 (R.I. 1987) and the law of the case doctrine (Brief 15-16). However, as *Taviera* states at 1107, the law of the case doctrine applies not to 37 year old final judgments but, rather, to interlocutory decisions in a pending suit, citing *Salvadore v Major Electric & Supply, Inc.* 469 A.2d, 353, 356 (R.I. 1983). As *Salvadore* makes clear, the law of the case doctrine is not to be confused with the "finality of the doctrine of *res judicata*." It is *res judicata* and its application to fundamental/subject matter jurisdiction judgments, which makes a 1988 summary judgment overuling a 1951 *cy pres* decree so wrong. (Petition 17-18).

Similarly, the respondents argue that summary judgment was proper by claiming that Justice Bourcier made a finding that the 1951 *cy pres* conveyance was in "fee simple, without any charitable restrictions whatever", citing in support the bare deeds and *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 134 A.815 (1926). (Respondents' brief 14-17; plaintiffs' petition 20-22, 23-25). Judge Bourcier made no such finding (petition 8n, 17n and 20). However, even assuming a distinct finding that the 1951 conveyance to CF&S was in "fee simple, without any charitable restrictions," the record shows, at best, nothing more than a mixed question of law and fact and thus, improper for summary judgment determination:

---

*And which may be expected to cast light on CF&S' title expectations and admissions.

**And, having merely noted these United States Supreme Court decisions under the standing issue, for which they had not been cited! See page 3, *supra*.

1. Even with important discovery demands outstanding, the record contains substantial evidence that Lakeside was charitable trust property (Petition 19-20, 23-24).

2. Judge Walsh's 1951 acceptance and exercise of *cy pres* authority over Lakeside as trust property was most appropriate (Petition 4-5, 19, 23-24).

3. The Superior Court's 1951 *cy pres* decree was an essential link in CF&S' chain of title as the subsequent April 1951 deed declares (Petition 4-5, 19; P.A. 11-12, 13-14; R.A. 12; *see* also, 46 *Am Jur 2d, Judgments*, Sec. 541).

4. CF&S has admitted the *cy pres* source and the trust nature of its title (Petition 6-7, 20-22; P.A. 30-31 and 42-44).

5. *Wakefield, supra*, holds that the Superior Court has exclusive, mandatory, continuing jurisdiction over the transfer of charitable trust property even where (a) there had been *no* prior judicial proceedings regarding the charitable trust property and (b) the circumstances did *not* call for the application of *cy pres*. See excerpt from opinion appended hereto (Petitioners' Supplemental Appendix 1); see also Petition 25n).

6. No case has been found — before this one — and none has been cited by the respondents or the courts below, where once *cy pres* has been invoked, a sucessor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld. (Petition 22)

7. CF&S has produced no letter, memorandum or other contemporaneous (1950-51) document which shows an intention to convey "fee simple title, without any charitable restriction" and, as indicated above, has withheld the very contemporaneous records which would shed light on its title expectations (Petition 19-21 and authority cited therein.)

RELIANCE ON AN UNPUBLISHED, NON-RECORD ATTORNEY GENERAL'S OPINION WAS PATENTLY UNTENABLE

While respondents claim the benefit of the Attorney General's purported finding of "no fault" in CF&S' unilateral 1987 "sale" of Lakeside for private commercial development (Brief 9, 16-17), they make no mention of (a) the late surfacing, still missing, R.I. Attorney General's "opinion" upon which the aforementioned finding was purportedly based or (b) the resulting breach of basic constitutional due

process. (Petition 22-25, 27-28). The Attorney General's deafening silence — here and below — has already been noted. (Petition 3n, 22).

RESPONDENTS' BIZARRE, UNFOUNDED CHARGES

There is no substance to respondents' assertion (17-18) that the petitioners (a) requested the Clerk not to docket their petition or (b) are in violation of Rules 21 and 29. The petition was timely served and filed by mail, without condition or reservation, on June 10, 1989. No application for any extension was made by the petitioners at any time.*

As filed correspondence confirms, the Clerk informed petitioners' counsel that Rule 21.1 (a) requires that the questions presented for review must appear immediately inside the cover. Counsel promptly expressed written apology for his error and, with the knowledge and apparent consent of one an all, promply complied by having all copies rebound and a duplicate statement of the questions inserted. Pursuant to Rule 33.7 the breach was considered cured and the filing timely.

Respondents' other charges (17-18) are equally lacking in merit and require no comment. Petitioners are content that the petition for certiorari and this reply brief be judged on their merits.

CONCLUSION

As provided in 28 U.S.C. Sec. 2106, this case should be summarily remanded for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
August 11, 1989

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*As a clerk confirmed to petitioners' counsel of record, some two weeks before the deadline, Rule 20.6 declares that such applications "are not favored" and are not lightly granted.

PETITIONERS' SUPPLEMENTAL APPENDIX

Excerpt from Plaintiffs' Petition for Reargument below, February 28, 1989 quoting *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 32. 134 A. 815 (1926):

> "In view of our answer to the first question we will say in answer to the third that the Town of South Kingstown has *not a marketable* title to the property described in the bill. It may, however, sell the property if so *empowered* by the *Superior Court* in an *appropriate proceeding.* The complainant is required to administer the charitable trust created by the gift under the supervision of the court in equity. The purpose of the donor has not failed. The object of the charitable use is still existent. By reason of the growth of the village of Wakefield, the situation of the trust property upon the principal business street of the village, and the dangerous condition of vehicular traffic upon that street, the tract may no longer furnish a suitable location for a public school. The circumstances of the case do not call for the application of the *cy pres* doctrine, but merely for the exercise of the ordinary jurisdiction of the Superior Court, sitting in equity, over the *administration of trusts.* It is as if the State in the exercise of the power of eminent domain had taken the property in question for some public purpose. The purpose of the charitable trust would not thereby fail but the compensation received for the land taken could still be administered under the supervision of the court to carry out the charitable intention of the donor. If, as the complainant claims, the tract of land can no longer be advantageously used to carry out the charitable purpose of the donor it would be *within the jurisdiction of the Superior Court,* if satisfied of the force of the complainant's contention, to permit a sale of the property, without any condition or restriction which would hamper its sale at an adequate price, and then to direct the trustee as to the administration of the capital of the trust in its changed form to effectuate the charitable purpose of the donor set out in his deed to School District No. 6."
>
> (Emphasis added)

Supreme Court, U.S.
FILED
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KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Second Reply Brief In Support Of A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

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QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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Additional Party — Respondent

Petitioners' Second Reply Brief In Support Of Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Rhode Island

---

Petitioners now reply to the respondent Children's Friend and Service ("CF&S") brief (and Rules 49.2 and 50.7 motion) received by mail on August 10, 1989.*

Summary

Petitioners brought this class action to protect their homes, their neighborhood, their environment and quality of life — the most fundamental property and liberty rights which anyone can have. (Petition 11) Their demonstration of monetary, recreational and

*Petitioners' reply to respondent R&F's brief was mailed August 11. A third respondent's brief — from the R.I. Attorney General — has since been received to which the petitioners shall also file a separate response.

environmental damage is substantial and fully documented (Petition 4, 7, 9, 11-12, 13-14n, 16; Petitioners Appendix 23-29, Petitioners' Second Supplemental Appendix, *infra* 1-5, 14, 16, 18, 20, 26). The petitioners were simply railroaded. (Petition 2-3, 6-11, 13-14, 17-25) Yet, the respondents say this Court is without power to set straight such fundamental unfairness. They are dead wrong.

In apparent recognition of the inherent weakness in respondents' basic position, CF&S has taken great liberties with the record, distorting Lakeside's charitable trust history and use, its longstanding recreational use and benefit to the surrounding community, the plaintiffs' substantial showing of injury-in-fact damage — (both economic and otherwise), and the *res judicata* consequences of the R.I. Superior Court's 1951 *cy pres* decree (which *was* briefed and re-briefed below, CF&S contrary assertions not withstanding). After two years of deafening silence, CF&S now offers a transparent "explanation" for its right-the-first-time August 1987 admissions of trust title. (Petition 20-21, P.A. 30-31, P.A. 42-44; CF&S brief 25n; see *infra* herein 7). CF&S, like the other respondents, continues to say nothing about its resistance to the petitioners' outstanding discovery demands, including its refusal to produce the contemporaneous records which one would expect to shed light on CF&S' Lakeside title expectations, i.e. *complete*, unexpurgated - (rather than 50-75% in some cases 90% *deleted*) — copies of CF&S' 1950-1951 directors' minutes, (Petition 21; P.A. 32-44; CF&S brief 20-26).

This Court has authority to set straight such manifest, fundamental unfairness. A summary, Section 2106 remand for completion of the petitioners' interrupted discovery will lift respondents' iron curtain and give petitioners' the opportunity to preserve Lakeside for those community purposes for which it was originally donated. (P.S.S.A. *infra* 6-17, 22-26). This is all the petitioners ask. Simple justice demands nothing less.

The Questions Presented are Properly Before the Court

Respondents try but cannot obscure the fact that this case turns on state adopted Federal law — *res judicata; res judicata* and subject matter/fundamental jurisdiction; injury-in-fact standing; Federal Rule 56 and summary judgment principles. (Petition 9n) All were briefed and rebriefed below, respondents' contrary assertions notwithstanding. (Petition 2, 6, 7-9, 9n, 11-4, 18, 19-22, 25 and 28; P.S.S.A. 19-21, 25-27, 29-31, 32-34) Compare, especially, CF&S' assertion that *res judicata* and its application to fundamental subject mat-

ter jurisdiction was not briefed below (Brief 8n) with the obvious fact that it was. [Plaintiffs' January 13, 1989 brief to the R.I. Supreme Court, pages 13-14 (P.S.S.A. *infra* 30-31) and plaintiffs' February 28, 1989 petition for reargument, pages 5-6 (P.S.S.A. *infra* 33-34); petition for certiorari 9n, 17-18].

This Court has the authority to review state decisions that are determined by adopted federal rules and case law. Indeed, distinguished scholars, giving good reasons, have recently recommended just that. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice* and *Procedure* (1977) Section 4021, 4027 and 4031 (petition 26-27; and Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions; A Study in Interactive Federalism,* 1985, 19 Ga.L. Rev. 861, 901-903, 907. Supreme Court review is especially appropriate, in cases like this which concern the interpetation of the Federal Rules of Civil Procedure. Wright *supra, Sec. 4031 at 768; Redish supra* at 865-866 (Petition 20n, 26).

Beyond Rhode Island's adopted federal law lies the plain error below in breach of federal constitutional standards. Regarding standing, petitioners could hardly have anticipated that the R.I. Supreme Court would ignore four prior decisions and one R.I. statute, most recently interpreted in 1977, and announce a retroactive rule that only the Attorney General could sue (and in a case where the plaintiffs had donated considerable time, money and effort). Such was "manifestly unfair" to the petitioners, as firmly stated in their February 28, 1989 petition for reargument, words which should have sufficed to remind the court below that due process standards had been breached. (Petition 27).

The standing ruling below in support of the Attorney General, followed his so-called opinion or "finding" of "no fault" (in the Lakeside commercial sale) which surfaced for the first time at the February 13, 1989 oral argument (P.S.S.A. *infra* 34) when his role suddenly changed from that of a passive participant to that of active adversary. (Petition 22-23; P.S.S.A. 34). Petitioners' February 28 reargument application — prepared on extremely short notice (petition 10n) made it clear that the court below had given weight to a non-record document which the petitioners had never been given an opportunity to examine or answer. (Petition 9-10, 27-28; P.S.S.A. 34-35). The Attorney General's about-face aggravated the fundamental unfairness already noted in the plaintiffs' reargument petition concerning the court's retroactive ruling that only the Attorney General had standing to protect Lakeside. (Petition 27-28; P.S.S.A. 34-35).

Given the lack of time and opportunity, the prior detailed briefing under state adopted federal law and the arguments made in the plaintiffs' reargument petition below, it would be entirely appropriate for this Court to address these issues by writ of certiorari. *Michel v. Louisana* 350 U.S. 91 (1951); *Wood v. Georgia* 450 U.S. 261 (1981) (CF&S brief 10). Alternatively, in view of the plain error and fundamental unfairness below and, as *Wood* also declares and as the petitioners request, the Court should summarily remand for completion of petitioners' short-circuited discovery. As stated in *Wood* at 265n:

> In this context, it is appropriate to treat the due process as one "raised" below, and proceed to consider it here. See *Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (decided on a statutory issue raised below but not raised in this Court). Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U.S.C. Sec. 2106 (authorizing this Court to "require such further proceedings to be had as may be just under the circumstances"); R. Stern & E. Gressman, *Supreme Court Practice* Sec. 627, p. 460 (5th ed. 1978) (in review of state cases, "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings"). See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

Under the circumstances of this case there is no basis for CF&S' assertion that the petitioners should receive no Section 2106 relief on grounds that petitioners are not lawfully before the Court.

Denying Petitioners' Standing was Patently Untenable

CF&S tries to avoid Rhode Island's adopted federal injury-in-fact standing law* by asserting that the plaintiffs have shown none. (Brief 11-16). This is gross distortion of the record. The petitioners' demonstration of injury - monetary, environmental and recreational - has been overwhelming. Such showing includes the February 20, 1987 letter of the R.I. Audubon Society's distinguished

*The injury may be "economic or otherwise". The line is drawn, not between injury and substantial injury, but between injury and no injury. *See*, for example, *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 316 A.2d 124, (1974), CF&S brief 12n.

executive director, Alfred L. Hawkes (P.A. 24, 26-29); the petitioners' detailed supplemental answers to *CF&S* interrogatories, verified January 24, 1988 (P.S.S.A. *infra* 1-5, 14; see also P.S.S.A. 19-20 and petition 12n); their March 30, 1988 verified amended class action complaint, pars. 14, 26 and 35-37 (P.S.S.A. 14, 16 and 18); and the petitioners' May 19, 1988 memorandum in opposition to CF&S' motion for summary judgment (and sources cited therein) P.S.S.A. 19-20). [On CF&S's own citations, petitioners' loss of outdoor recreation activities and neighborhood quality alone suffice to meet federal injury requirements. (Brief 15n, 16n)]

Lastly, CF&S argues that, notwithstanding the petitioners' demonstration of injury-in-fact standing, only the Attorney General can sue. The four principal R.I. Supreme Court cases cited (18-19) — *Newport Hospital v. Harvey*, 47 R.I. 382, 133 A 648 (1926), *Powers v. Home for Aged Women*, 55 R.I. 187, 179 A. 610 (1935), *Leo v. Armington*, 74 R.I. 124, 59 A.2d 371 and *Israel v. National Board of Y.M.C.A.*, 117 R.I. 614, 369 A.2d 646 (1977), all show that the Attorney General is *not* the sole person who may bring suit to enforce charitable trust duties and that making him a party, as the petitioners have done, is sufficient. Moreover, while paying lip service to cases previously cited by the petitioners (petition 14-15), CF&S totally ignores the Rhode Island statute (construed in *Israel supra*), which petitioners also cited and reproduced, R.I.G.L. Section 18-9-5. (Petition 14-15, P.A. 6.) Section 18-9-5 provides for notice and participation opportunity, nothing more. (P.A. 6) Having been made a party, the Attorney General was given every opportunity to participate in this case and thus insure that the public's rights are fully protected. This is all that *Newport Hospital* (1926), *Powers* (1935), *Leo* (1948) *Israel* (1977) and R.I.G.L., Sec. 18-9-5 *supra* require. [Similarly, CF&S also avoids (a) the collateral reference text authority immediately following R.I.G.L., Sec. 18-9-5 and (b) the recent decisions in other jurisdictions, *Parsons v. Walker*, 28 Ill. App. 3rd 517, 328 N.E. 2d 920 (1975) and *City of Reno v. Goldwater*, 558 P. 2d 532 Nev. (1976) (Petition 16)].

The decision below, which cited no precedent or legal authority, cannot be reconciled with either the aforementioned R.I. statute (R.I.G.L., Sec. 18-9-5) or Article 1, Section 5 of Rhode Island's own Constitution.* Simply put, the retroactive ruling below, which

*Section 5. *Entitlement to remedies for injuries and wrongs — Right to justice.* — Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conforably to the laws.

deprived these homeowners of access to the courts to protect their homes and their environment from misappropriation of community open land - in favor of an insensitive attorney general, who first refused to move into the breach and then, on February 13, 1989 at appellate oral argument, shifted gears and became a tellingly vigorous adversary — is not only untenable but also an outrage. Certainly, such an unjust result must not be allowed to stand in these crucial environmental times. (Petition 12, 16-17)

Rule 56 Summary Judgment was Patently Untenable

Much, if not all of the petitioners' August 11, 1989 reply to respondent R&F's treatment of this point also applies with equal force to CF&S and need not be repeated. (*Id.* 3-5) The historical facts which the respondents cannot tolerate (and the courts below ignored), are documented in the petitioners' second supplemental appendix *infra.* These include (1) Lakeside's 1912-16 acquisition with donated funds specially solicited from community members in aid of pre-existing charitable programs handicapped for lack of a permanent location (P.S.S.A. 7-8, 14-26, 22); (2) the initial charitable holder's repeated recognition of its resultant trust responsibilities (P.S.S.A. 9-10, 11-13, 14-15, 16-17, 22-26); and (3) the resultant legal/equitable duties and consequences (P.S.S.A. 27-31).

The "bottom line", which CF&S ineptly tries to obscure, is that, at best this case presents mixed question(s) of law and fact which cannot properly be decided under Rhode Island's adopted Federal Rule 56 and summary judgment law (Petitioners' reply to R&F 3-5; Petition 17-22). Some of CF&S' misguided efforts or stark omissions are:

1. An attempt to avoid the *res judicata* consequences of the R.I. Superior Court's 1951 *cy pres* decree (Petition 17-18) by claiming that Rhode Island's adopted federal law of *res judicata* and its application to fundamental/subject matter jurisdiction (Petition 9n) was not raised below (Brief 8n) when, in fact such law had been briefed and re-briefed. (P.S.S.A. 30-31 and 33-34; petition 17-18)

2. An attempt to avoid the documented, 1936 opinion of the initial charitable holder's Honorary Counsel, George H. Huddy, Jr., that the Society held title to Lakeside as trustee and was under a duty to continue to hold the property for the charitable purposes for which Lakeside "had been placed in its name"

(Petition 23), by claiming that Mr. Huddy's opinion "was not part of the record below" (Brief 28) when, in fact it is. Repeated reference to Mr. Huddy and his aforementioned opinion (which the Society heeded) may be found in Petitioners' Second Supplemental Appendix, *infra* (P.S.S.A. 11, 17, 24; see also petition 23 and P.A. 22).

3. An attempt to avoid the consequences of the petitioners' outstanding discovery demands (and the respondents resistance) by making no mention of the subject. (Petition 18-22).

4. An attempt to avoid the consequences its dogged refusal to produce (and which petitioners' outstanding discovery demands include) the very contemporaneous records which one would expect to shed light on CF&S's Lakeside title expectations, i.e. *complete*, unexpurgated (rather than 50-75% in some cases 90% deleted) copies of CF&S' 1950-51 directors' minutes (Petition 21), by making no mention of the subject.

5. A clumsy attempt. after two years silence, to explain away its repeated admissions of trust title in its initial August 1987 memorandum (Petition 20-21, P.A. 30-31, 42-44) by now asserting that CF&S had been doing nothing more than accepting as true the allegations of the petitioners initial verified complaint (Brief 25). CF&S' belated August 1989 "explanation" has a hollow ring, particularly in view of the petitioners repeated reference to this matter below to which CF&S offered nothing but silence. (Petition 20-22) E.g., plaintiffs May 19, 1988 (p. 15) and June 30, 1988 memoranda in opposition to summary judgment; plaintiffs' January 13, 1989 R.I. Supreme Court brief (pp. 3, 13; R.A. 38-40, 79-80); plaintiffs' February 28, 1989 petition for reargument (p. 10). See P.S.S.A. 30-31 and petition herein 20-22, P.A. 30-31 and 42-44. (A copy of the petitioners' initial complaint is reproduced at P.S.S.A. 36-41). On summary judgment such conflicts must, of course, be viewed in a "light most favorable to the opposing party". (Petition 22 and decisions therein cited). This is especially appropriate here in view of the witheld documents discussed immediately above in numbered paragraph 4.

Reliance on an Unpublished Non-record Attorney General's Opinion was Patently Untenable.

CF&S's ascerbic discussion of this issue (brief 26-29) canot obscure

the following facts:

1. The R.I. Attorney General and his office were not notified of the June 12, 1987 back-to-back real estate transactions among respondents CF&S, Sherry and R&F. See Paul Huling May, 19, 1988 affidavit, P.A. 18-19. Indeed, Assistant Attorney General Murray made pointed references to such non-notification at the November 10, 1987 plaintiff Eileen Naughton deposition; the transcript so shows. (P.A. 19). There is no contrary record evidence, CF&S' assertions notwithstanding.*

2. CF&S's aforementioned August 17, 1987 memorandum contained the pointed statement that the "administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction." (P.A. 30). CF&S repeated its statement, word-for-word in its April 26, 1988 summary judgment memorandum. (P.A. 42) Except as immediately, hereinafter stated, the record, to petitioners' knowledge, contains no contradiction

3. Thus, it was most surprising to the petitioners, at February 13, 1989 oral argument, to hear the Assistant Attorney General say that his office had made inquiry and had prepared an opinion or finding of "no fault" with CF&S' June, 1987 sale of the Lakeside property for private development. During February 13 oral argument and again in its February 23 order/decision, the court below was visibly impressed by these statements. Petitioners so noted in their February 28, 1989 petition for reargument (P.S.S.A. 34; petition 22).

4. In their February 28 reargument application, the petitioners stressed that the record contained *no* such opinion or finding and protested the court below's deference to, if not acceptance of a thus-far undocumented Attorney General opinion or finding, which the petitioners had never seen. (P.S.S.A. 34-35; petition 9-10, 22)

5. The Attorney General had an opportunity to cast light on this matter in his March 13, 1989 memorandum filed in

*Just before filing their initial complaint, petitioners advised the Attorney General and his office that he would be named as a party for the sole purpose of ensuring jurisdiction. There is no substance to CF&S' claim that petitioners requested authority to sue "as relators, in the name of the state". (Brief 26n; see Huling affidavit *supra*, P.A. 18-19)

response to the petitioners' February 28 reargument petition, but chose to make no mention of the subject. (Petition 3n, 22n). Reargument denial followed shortly (P.A. 3)

Under the foregoing circumstances, the R.I. Attorney General should have made full disclosure by promptly filing his opinion/finding and giving petitioners an opportunity to respond. If there was, in fact, no such document, this too should have been fully and promptly disclosed. Maintaining silence was manifestly unfair to the petitioners and denied them due appellate process.

CF&S' Motion for Costs

There is no more merit to CF&S' costs motion than that initially filed by respondent R&F (Petitioners' August 11, 1989 reply brief 5). The negative effects of such applications generally is well noted by Mr. Justice Stevens, concuring in *Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985).* Petitioners are content that the petition for certiorari and their reply briefs be judged on their merits.

CONCLUSION

As provided in U.S.C. Section 2106, this case should be summarily remanded for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
August 25, 1989

Respectfully submitted,
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PETITIONERS' SECOND SUPPLEMENTAL APPENDIX

Excerpts from Plaintiffs' Supplemental answers to Defendant's Interrogatories, verified January 24, 1988.

Plaintiffs responding further to the interrogatories of defendant Children's Friend and Service, Inc.:

1. Set forth the place and date of incorporation of "The Warwick Land Trust, Inc." setting forth the names of (a) all incorporators of the Warwick Land Trust, Inc., (b) all officers and directors of the Warwick Land Trust, Inc., (c) an itemization of all assets of Warwick Land Trust, Inc.

1. Plaintiff Warwick Land Trust was incorporated as "Friends of Warwick Pond and Hoxsie also Warwick Land Trust" at the office of the Rhode Island Department of State, Providence, on April 24, 1987. Its incorporators, officers and directors are listed in its articles and certificate of incorporation and its current brochure, copies of which are annexed *to plaintiffs' initial answers* and made a part hereof. Its financial assets presently consist of (a) approximately $1,000.00 in general purpose funds; (b) $10,000.00 appropriated by the General Assembly for special purposes; (c) a $400,000.00 grant approved by the R.I. Department of Environmental Management for special purposes; (d) a $250,000.00 loan commitment from the R.I. Heritage Preservation Commission for special purposes and (e) additional funds contributed/advanced for anticipated litigation expenses by community residents.

2. Set forth the residence address of the Plaintiffs, Paul Huling, Jeanne M. Foster, Eileen Naughton and Kathleen Preiss, and as to each such residence, set forth the distance in feet of the residence of each of said Plaintiffs from the nearest boundary of property owned by Children's Friend and Service, Inc. on Lakeshore (sic) Drive, Warwick, Rhode Island.

2. Plaintiff Paul Huling resides at 107 Fairway Lane, Warwick, approximately 300 feet from the property at issue herein. Plaintiff Jeanne M. Foster resides at 31 Lakecrest Drive on Warwick Pond, approximately 300 feet from the property at issue. Plaintiff Eileen Naughton resides at 100 Old Homestead Road, approximately 4000

Supplemental/Amended material is italicized in text.

feet from the aforesaid property. Plaintiff Kathleen Preiss resides on Lakeshore Drive, Directly abutting the property at issue.

4. Itemize all usages of the real estate formerly owned by Children's Friend and Service, Inc. located on Lakeshore Drive, Warwick, Rhode Island for the past 7 year period prior to date of the filing of the Complaint, setting forth as to each such usage (a) the owner of the land during such usage, (b) the term during which said real estate was subject to the usage in question.

* * *

(b) Between August 4, 1980 and August, 1981 when, upon information and belief, its Warwick Pond remedial programs were terminated, the defendant Children's Friend operated intermittently a shelter care program for community infants and a residential treatment center for community children. As of August 4, 1980 and continuing thereafter, Children's Friend permitted the community to use the property at issue for boating, fishing, bicycling, swimming, hiking, ice-skating, sailing, bird-watching, soccer, baseball, basketball, nature education, photography, picnicking and other community recreational purposes. Such activities date back many years to the early 1900's and have continued through the date of these answers to interrogatories, although less frequently after the purported conveyance(s) of June 12, 1987 and the subsequent stationing of a vigorous, if not dangerous, German Shepherd dog on the premises.

The property's facility house, while closed for CF&S remedial programs in or about August, 1981, was used to house a drum and bugle corps from Warwick, England in 1982.

5. Itemize the so-called recreational usage of the premises in question as alleged in Paragraph 9 of the Complaint, giving the names and addresses of all persons who participated in such usage and the dates thereof.

* * *

As indicated above, many of the persons who contributed funds to acquire the Lakeside property, did so because of their interest in summer camping, outdoor recreation and similar work for children. Indeed, for many years

thereafter, the Providence Society for Organizing Charity sponsored summer recreational care for children and the parents of children in need of outdoor life. Similarly, the community at large was permitted to use the property simultaneously for recreational purposes including those mentioned above in response to Interrogatory 4. Such recreational uses continued under the purview of Children's Friend commencing in 1951 and continuing through 1987.

It would be burdensome and indeed impossible to list the "names and addresses of all persons who participated in such usage and the dates thereof." Many, of course, are deceased. They include generations of adults and children residing on or east of Warwick Avenue and elsewhere as well as those to its west on or near Warwick Pond and the property at issue. Many R.I. community children, as Children's Friend and Family Service records should confirm, received remedial treatment and care there. They too participated in the aforementioned recreational activities along with the other community children. Among the community groups which have used this property for recreational purposes are those connected with, if not sponsored by, the Boy Scouts, Girl Scouts, (including Hoxsie Troop 517), Little League, the Warwick Recreation Department, St. Timothy's Church and the Rhode Island Audubon Society. Many other R.I. community children and adults have used the premises on a less organized basis.

Beyond defendant's own records and recollections and those of Family Service and its present and former divisions, there are other Rhode Island documents and residents which/who can confirm the longstanding recreational purposes and usage of this property. These include Warwick City Historian Donald D'Amato's (February 24, 1987 *Warwick Beacon* article, *plaintiffs' Exhibit 4 on discovery*); R.I. Audubon Society Executive Director, Alfred L. Hawkes, (annexed February 20, 1987 letter also included in plaintiffs' Notice of *Lis Pendens*, herein); the aforementioned Chester V. Foster Jr., a 25 year Warwick Pond resident who has created a documentary film on the property; and Dorothea (Bonneau) Borden, a 50 year

Warwick resident (*See her annexed 1987* letter to the *Warwick Beacon*).

Mr. Foster, who grew up in the area, recalls that he and his friends took part in fishing from the shore, playing baseball on the land adjoining the road leading to the Home and the land now occupied by St. Timothy's Church, flying model airplanes, ice skating on the small pond on the property, and other childhood activities of play such as cowboys and indians, tag, hide and seek, exploring, etc. Youngsters from his and adjoining neighborhoods played on this land, including: Tim Martin, John Martin, Mark Bloomquist, Steven Bloomquist, Ray Nelson, Roy Nelson, David Tucker, Steven Tucker, Bill Enos, Joe Miller, Kurt Taylor, Jim Duffy, Rob Goodwin, Jim Hughes, Charlie Bradbury, Mark Gourner, Carl Gourner, Steve Reynolds, Terry Reynolds, Don Whitcher, Phil Gunnion, and many others. In addition to those who played on the land there were those who used the well worn bicycle path leading from Lakecrest Drive to Lakeshore Drive. For many years the bicycle path has been used on a daily basis by school children attending St. Timothy's School.

Mr. Foster recalls no instance of anyone having been put off the land while the Lakeside Home was open. During his Junior High School days some of the older children at the Home became his friends as they rode the school bus with the other neighborhood children who attended Gorton Junior High School. Randall Holden School Principal Pauline Salvatore encouraged such neighborhood interaction. (*Beacon* article April 30, 1981)

In 1979 the Lakeside property was the home of a Little League baseball team. The Team's Roster, listing its 15 young members is *annexed to plaintiffs' initial answers.* Certainly parents and friends of team members were welcome guests to the Lakeside facility during this period.

12. Set forth all the facts upon which Plaintiffs base the allegations of Paragraph 18 of the Complaint, setting forth the name and address of every person who allegedly engaged in boating, fishing hiking, swimming, bird watching, soccer, baseball, basketball, photography, or any other recreational

purpose on the real estate owned by Children's Friend and Service, Inc. and the dates of such usage by such person, together with the name and address of the representative of Children's Friend and Service, Inc. who gave such permission to said person.

12. It would be burdensome and indeed impossible for the plaintiffs *as CF&S now seems to recognize, (c.f. CF&S's objections to the plaintiffs' document requests),* to set forth "the name and address of every person" — literally thousands — who participated in boating, fishing, bicycling, hiking, swimming, bird-watching, soccer, baseball, photography and other recreational activities on or adjacent these premises during 1951-87. Detailed references to these activities during and indeed prior to the past 36 years period have already been set forth in plaintiffs' answers to Interrogatories 4(b), 5 and 7 and, to a lesser extent, 6 and 8, to which defendant's attention is directed. Organized groups which have made recreational use of the foregoing premises have been mentioned in answer No. 5 along with the names, identity and location of long-time Warwick residents and other knowledgeable persons who can confirm such recreational use, both organized and casual.

During this entire period, Children's Friend had representatives on the premises including staff at its facility building (1951-81) as well as a property superintendent(s), who, apparently, continues to reside on the premises through the date of these answers to interrogatories. *Hundreds of children annually* receiving care at said defendant's facility and their families are known to have participated in such recreational activities along with other community members. Moreover, community service groups and volunteers, e.g. Rotary Club and Lions Club, were direct participants in programs which the defendant itself sponsored. *Other community members, including the plaintiff Eileen Naughton and her family, donated clothing for needy children.*

Pre-trial discovery of said defendant CF&S, its records and recollections is expected to provide further information and details. Such community recreational use was *an important* charitable purpose which motivated the property's original donors to make their charitable gift some 70 odd years ago. (Nos. 5, 6, 7, and 8 herein)

Providence Society for Organizing Charity (later Family Welfare Society of Providence, now Family Service, Inc.) documents appended to Plaintiffs' Supplemental Answers to Interrogatories, verified January 24, 1988.

(a) *Providence Journal* article February 29, 1912 as recopied by Providence Society (Exhibit 12 — Plaintiff Naughton November 10, 1987 deposition).

(Copied from the Providence Journal p. 5 col.5 — Thurs. 2/29/12)

PROVIDES SUMMER HOME FOR POOR
Charity Society Gets Lakeside
Sanatorium at Hoxie

FOR MOTHERS AND CHILDREN

Funds for Purpose Solicited by Subscription, Making it Possible to Get Property Without Interfering with Regular Work of Society for Organizing Charity. -- 57 Contributors.

The Lakeside Sanatorium at Hoxsie on the west shore of Providence River in the Town of Warwick, originally known as the Parker Institute for Physical Training, has been acquired by the Providence Society for Organizing Charity for the purpose of providing summer outings for poor mothers and children.

Negotiations for the transfer of the property were concluded yesterday. The large structure will be used as a place where mothers and small children may rest and recuperate in the summer months.

The property was purchased from Pryce Owen of this city, and was made possible by the efforts of a special committee composed of James A. Kinghorn, Chairman; Dr. Jay Perkins, Henry D. Sharpe, Mrs. John Tempest Walker, Francis M. Smith, and Barry Cutler. This committee solicited funds by subscription and made it possible to get the property without interfering with the regular work of the Society.

The structure is admirably adapted in every way for the

purpose of the society. Mr. Williams was highly pleased at the success of the society through its committee. He expressed the opinion that it is the beginning of a permanent home for convalescent work. There were 57 contributors to the fund which in the aggregate amounted to $10,000. The purchase price was not made public but Mr. Williams said that it was very reasonable.

NAMED LAKESIDE HOME

The new place has been named the Lakeside Home and will be opened the latter part of May. It is not the intention of the Society to treat any communicable disease at the home. In speaking of the work, Mr. Williams said: "For three years during the summer months the Society for Organizing Charity has carried on outing work, primarily for children, and we have always had to rent for this purpose property often not very accessible to the city. Last summer we extended the work to include some mothers. We now wish to secure a definite location, where eventually we will be able to carry on the work all the year round, and not only provide summer outing, but also convalescent care for mothers who are convalescing from confinement and who must often do the work of the home too soon, and in consequence the health of both mother and baby is impaired; for working women who are often compelled to go beyond their strength in order to provide for their families, and for working girls who, while not hospital cases, need a period of rest and recuperation in order to prevent serious sicknesses.

"We also wish to provide extended care for delicate children suffering from mal-nutrition and general neglect, often due to the ignorance of the mother. Such children either contract tuberculosis or becomes the cripples of our community if proper care is not given during childhood, and we hope to have arrangements for at least 50 such children in this home during the summer months.

EDUCATIONAL INFLUENCE

"While the prime object of the work will be to care for the class of persons enumerated above, we believe that the direct educational influence will bring on the whole the very best results. It will give the nurse in charge an

opportunity to teach the mother how to take care of her home and her children."

The Lakeside Home is situated on the west side of the tracks of the Buttonwoods line south of the Hoxsie station, overlooking the bay in the distance from the large broad veranda, with a fresh water lake in the rear. The house contains 26 large rooms radiating from two spacious halls, and it is surrounded on two sides by a wide piazza. It was built in 1897, and is of pleasing architectural design.

The property includes 16 acres of level land and is equipped with golf links, tennis and hand ball courts. The lake affords fishing and swimming, as does the salt water close by. The ride from the city takes but 30 minutes.

Every room is adequately equipped with modern conveniences for the purpose to which it will be used.

(b) Excerpt from "Summer Outings" and Appendix, *circa* December, 1935 (App. pages 10-11).

Tuberculosis Committee	*Outing Committee*
Charles A. Catlin	Henry D. Sharpe
Frederick Rueckert	James A. Kinghorn
Charles A. Russell	Henry Dunnell
James A. Kinghorn	Mrs. John Tempest Walker
Rev. A. M. Lord	Mrs. William McDonald
James B. Williams	

24. *Executive Committee* 11/24/13 (par. 6) "The League's request for "permission to use Lakeside Home for preventorium work during the winter was granted until such time as property was required for the regular work."

25. *Executive Committee* 3/13/16 (par. 7) Mr. Sharpe announced purchase of additional property and its addition to Lakeside Home and deeded to Society.

26. *Board of Directors* 2/12/19 (last par p. 2) "Dr. Perkins reported on meeting held to consider plans for raising money for Lakeside. He said that Mr. Henius had suggested transferring Lakeside to a committee composed of representatives of all agencies interested in outing work.

"Voted, that this question be referred to Executive Committee."

27. *Executive Committee* 2/27/19 (par. 5) "Voted that financing and running of Lakeside be entrusted to the recently appointed committee which shall have power to add to its members — the members are Dr. Perkins, Mr. Henius, Mr. Kinghorn, Mr. Sharpe, MR. E. Tudor Gross, Mr. Charles A. Russell, Mrs. Walter Peck, Mr. E. B. Hough, and Mr. James Cheesman."

"Secretary instructed to obtain telephone vote of absent members of the Executive Committee on this subject."

(Note: - Mr. Cheeseman was the only member of this Committee who was not a member of the Board of Directors of the Society.)

28. *Board of Directors* Report of Committee appointed at Board Meeting of January 21, 1920

*28a See letter to Mr. Sharpe under date of Jan. 29, 1920 from Mr. Huddy. (inserted after Appendix)

February 18, 1920

Mr. A. M. Coats, President
Providence Society for Organizing Charity
Providence, R.I.

Dear Mr. Coats:-

The Committee of the Board appointed at the last meeting of the Directors to confer with the committee of those interested in the prevention and suppression of tuberculosis relative to a separation from this Society of the work in which they are engaged, begs to make the following report.

Understanding that the wish to separate from this Society and form a new organization called the Providence Tuberculosis League, is proposed following their plan to have reorganization and enlargement of the work, we recommend that this Society cooperate with them by sanctioning the separation and also in the leasing to them of the Lakeside Home with its equipment under such terms as are appropriate

in view of our Society being in position of a trustee for the use of the Home for those purposes for which the property has been placed in our care.

While the committee was appointed with power to make arrangements, a perusal of the by-law under which the real estate is held in trust by us makes us of the opinion that the proper way in which to proceed is to have the action definitely approved by the Board and later such action to have the written approval of the several real estate managers. Accordingly, after consultation with the Mssrs. Perkins, Kinghorn and Rueckert, the * have prepared a form of lease for the real estate which is submitted herewith; we recommend it for approval by the Board and authorization for its signature on behalf of the Society. The lease has been drawn up and generally approved by our counsel, Mr. George H. Huddy.

As to the equipment of the Home, we would recommend that its lease to the new organization be arranged after a proper inventory of same is made, the lessee to pay a nominal rent and to be generally responsible for careful usage and replacement, allowance being made for wear and tear.

Respectfully submitted,

(Signed) Henry D. Sharpe
Philip B. Simonds
P. H. Gardner

*Committee of the League

2/18/20 "The President read the report of the Committee appointed to consider leasing the Society's property at Lakeside to the Tuberculosis Association. Mr. Sharpe read the proposed lease of the property at Lakeside. Upon motion by Mr. Sharpe, seconded by Judge Rueckert, it was voted that the officers of the Providence Society for Organizing Charity be and are hereby authorized to sign the lease as presented. (and the separation of the two societies is agreed to).

(c) Memorandum re conversation with Honorary Counsel George H. Huddy, Esq., January 18, 1936.

Memo

(Based on conversation with Mr. George H. Huddy, Honorary Counsel of the Family Welfare Society. Mr. Huddy has gone over this material.)

On January 18th, 1928, Mr. Huddy stated that he had gone over the narrative report showing the history of Lakeside but that he would like to study the material further before submitting a written report. However, his tentative reaction is that the summer outing program was developed by the Society as a distinct function over a long period of years, that the money to purchase Lakeside was raised for the purpose of conducting such a program; and that the Society had an obligation to maintain a summer outing program; that the program the Tuberculosis League was carrying on at Lakeside was a matter of convenience to the League.

Mr. Huddy felt that, assuming that both the summer outing program of the Family Welfare society and the Tuberculosis League's work can be carried on conveniently at Lakeside that some arrangement could be worked out whereby both the programs could be continued at Lakeside.

Mr. Huddy thought that an arrangement might be entered into between the Society and the League whereby any buildings erected by the League might be completely owned by them and disposed of when they no longer were useful to the League and in that way they would be re-imbursed for whatever investment they made in the buildings. Or, a long time lease giving the Tuberculosis League sufficient time to amortize the buildings they might put on the land could be arranged.

Mr. Huddy thought that in view of the conditions under which property was purchased, the Family Welfare Society was obligated to continue to hold title as trustee for those purposes for which the property has been placed in its name.

Summer outing work is not necessarily tied to Lakeside if the Family Welfare Society decides there is a better

location but wherever it is located the summer outing work should have the benefit of the values that are represented in Lakeside.

(d) Memorandum re Lakeside Property, Charles P. Sisson, Esq., December 11, 1946.

Memorandum: Re - Lakeside Property

The President of our society has conferred several times with Dr. Pinckney and Mr. Brown. Our General Secretary has also conferred with Dr. Pinckney and with Mr. Loosley of the Community Fund. The members of our board are fairly familiar with Dr. Pinckney's previously expressed desire that our society would convey the property to his organization. The doctor has been advised definitely that we will not do this. He has now suggested the possibility of the property being used as a Children's Hospital Center with a number of children's organizations uniting to use and improve the property for this purpose.

Mr. Brown has conferred with Mr. Loosley in regard to this suggestion and Mr. Loosley feels that if we are willing to defer final action for a few months that Dr. Pinckney's latest suggestion should be considered, studied and explored by the Community Fund.

To encourage this study, it has been proposed that we commit the Family Welfare Society of Providence to as definite a course of action as the following:

a. The proposed use of the property is approved by the Community Fund.

b. The proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society.

c. The project shall be in form for our study not later than June 1, 1947.

Action by the Board of Directors of the Family Welfare Society of Providence on the substance of this memorandum will be an order of the business at the board meeting on December 18, 1946.

(Signed) Charles P. Sisson, President
Family Welfare Society of Providence

(e) Letter from Richard M. Brown to Dr. John I. Pinckney, December 26, 1946.

December 26, 1946

Dr. John I. Pinckney, Executive Secretary
Providence Tuberculosis League
100 North Main Street
Providence 3, R.I.

Dear Dr. Pinckney:

At the suggestion of Mr. Charles P. Sisson, President, Family Welfare Society, I am writing to acquaint you with the action taken by the Board of Directors of the Society with relation to the Lakeside property. The following recommendation was unanimously approved in a meeting of our Board held December 18, 1946:

"That the Family Welfare Society of Providence will deed the Lakeside property to a Children's Hospital Center or organization, provided:

a. The proposed use of the property is approved by the Community Fund.

b. The proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our Society.

c. The project shall be in form for our study not later than July 1, 1947."

I sincerely hope that the above action will prove satisfactory to you and others interested in developing a health project for children and that during the course of the next several months your planning together will begin to take shape.

Sincerely yours,
Richard M. Brown
General Secretary

Excerpts from Plaintiffs' Verified Amended Complaint — Class Action, verified March 30, 1988.

Background

14. The property at issue was given and has been used for recreational, remedial and other community charitable purposes for more than seventy years, as best described and understood against the following background.

15. The Providence Society for Organizing Charity (subsequently Family Welfare Society of Providence and now Family Service, Inc.) was created by an act of the Rhode Island General Assembly at the January, 1898 session. The Society's corporate purpose, as stated in its charter, was "organizing charitable work, diminishing pauperism and improving the condition of the poor."

16. Commencing in or about 1902, some ten years prior to the gift of the initial parcel in 1912, the Providence Society for Organizing Charity, its divisions and committees, had been conducting summer outing programs for community children. Commencing in or about 1905, the Society and its Committee on Tuberculosis (later separately incorporated as the Providence Tuberculosis League) began investigating and conducting activities to prevent tuberculosis. These programs were (a) devoted to community children but (b) handicapped by the lack of a permanent location controlled by the Society.

17. By vote of the Society's board of directors, October 17, 1911, a committee was appointed to "look over" the proposition of acquiring property "for a permanent summer outing place and convalescent home." The aforementioned committee reported to the Society's board on December 20, 1911 that after considering many locations for outing work as well as a convalescent home, the Lakeside Sanatorium at Hoxsie was most desirable. A second Society board committee was then appointed to acquire the property for the foregoing purposes provided sufficient monies could be raised "without public appeal for funds."

18. Fifty-seven community members responded to the Society's solicitation and contributed roundly $10,000, the sum required to obtain the aforementioned Lakeside (Warwick Pond) property. The Society's board was so informed on February 23, 1912. With February 23, 1912 board approval, title was

temporarily taken in the name of Brown University's then president, William H. P. Faunce, as trustee.

19. Public announcement of the Society's acquisition, through subscription funds, was made by February 29, 1912 *Providence Journal* article. References to (a) the efforts of the foregoing committee, (b) fifty-seven contributions and (c) the beneficial summer outing and convalescent care purposes were also made therein. Outdoor recreation and convalescent care programs formally commenced at Lakeside on or about June 17, 1912.

20. Meanwhile, at the aforementioned February 23, 1912 Society board meeting and a subsequent March 5, 1912 executive committee meeting, consideration was given as to how title and control of the Lakeside property might be held and administered "for the purpose for which the money was contributed." Thereafter, at the Society's annual meeting, October 25, 1912, the by-laws were amended to create a Board of Real Estate Managers who would have "management and control" of the Society's real estate, i.e. Lakeside. The initial managers elected were Preston H. Gardner, George H. Huddy, Jr., Esq., Charles A. Catlin, Samuel H. Tingley and Henry D. Sharpe.

21. Dr. Faunce thereupon formally deeded the Lakeside property to the Society on or about October 31, 1912. Additional adjoining property was similarly acquired as Mr. Sharpe informed the Society's executive committee on March 23, 1916.

22. The Lakeside (Warwick Pond) summer outing program of the Providence Society for Organizing Charity, accommodating 500-600 community women and children and the convalescent program of the Society's aforementioned Committee on Tuberculosis, accommodating 60-170 children, continued until 1920.

23. By report to the Society's board dated February 18, 1920, a committee of Messrs. Sharpe, Gardner and Philip B. Simonds recommended that the Society lease the premises to the recently incorporated Providence Tuberculosis League "under such terms as are appropriate in view of our Society being in the position of a trustee for purposes for which the property has been placed in our care." The proposed lease was thereupon executed as were subsequent renewals thereof.

24. The Society's summer outing work continued during the 1920-28 period accommodating about 500 women and children

each summer during those years along with the tuberculosis League's remedial programs.

25. The foregoing remedial activities and to a lesser extent, the aforementioned summer outing work continued through 1934. Thereafter, during the ensuing fifteen years, until about 1950, the Tuberculosis League continued to conduct, with community support and assistance, remedial and residential programs for community children at Lakeside.

26. As indicated above, many of the persons who contributed funds to acquire the Lakeside property and, in subsequent years to support the Society's and the League's programs, did so because of their interest in summer camping, outdoor recreation and similar work for children. For many years the Society with cooperation and support from the League, sponsored summer recreational care for both children and the parents of children in need of outdoor life. Similarly, during the 1912-50 period, the community at large was permitted to use the property simultaneously for boating, fishing, swimming, hiking, ice-skating, sailing, bird-watching, nature education, photography, picnicking and other community recreational purposes.

Fiduciary Recognition

27. Commencing with its acquisition of the initial 1912 parcel with funds solicited and received from community members for the purposes of aiding and promoting its community charitable work and continuing for almost forty years thereafter, the Providence Society for Organizing Charity recognized its concomitant fiduciary responsibilities. Such recognition is confirmed by (a) the foregoing allegations in paragraphs 2, 14-26 above and (b) documented contemporaneous statements by Society board members including, among others:

(a) The "general sentiment" of the Society's executive committee at a March 12, 1912 meeting (paragraph 20 above) that the property should be "vested in a Board of five trustees to be administered by them and under an indenture for the purpose for which the money was contributed and in harmony with this Society."

(b) The Society's subsequent October, 1912 annual meeting action (paragraph 20) amending its by-laws and

placing the property under the "management and control" of a newly authorized five member Board of Real Estate Managers including Henry D. Sharpe, Preston H. Gardner and George H. Huddy, Jr., Esq.

(c) The written February 18, 1920 report of a Society board committee, signed by Messrs. Sharpe, Gardner and Phillip B. Simonds, (paragraph 23) advising that the Tuberculosis League lease should contain "terms as are appropriate in view of our Society being in a position of a trustee for the use of the home for those purposes for which the property has been placed in our care."

(d) A prior January 29, 1920 letter from the Society's counsel, the aforementioned Mr. Huddy (Huddy, Emerson & Moulton), to Mr. Sharpe that the proposed lease contain a covenant that the League would "carry on in the use of the demised premises, the proposed charitable work to the satisfaction of the Society..."

(e) The actual provision contained in 1920 and 1926 leases mandating that the League would use the premises "solely for the carrying on of its charitable work in connection with the prevention of tuberculosis and the carrying on of the summer outing work heretofore administered by the [Society]..."

(f) The documented January 18, 1936 statement by Mr. Huddy, then Honorary Counsel of the Society, that "in view of the conditions under which [the Lakeside] property was purchased the ... Society was obligated to continue to hold title as trustee for those purposes for which the property was placed in its name."

(g) A unanimous Society board resolution, adopted December 18, 1946 upon written recommendation of its president, Charles P. Sisson (former Rhode Island Attorney General) that the Society would deed the Lakeside property to the Children's Hospital Center, provided the "proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our Society."

1951-1987 Period

35. During the ensuing thirty years, CF&S, with community assistance and support, provided emergency and shelter care for needy children at the Lakeside (Warwick Pond) property. During the years 1955-68 the number of children receiving such care appears to have ranged from 200-400 annually. Food, clothing, medicine, child care and "substitute parenting" were also provided. Commencing in or about July, 1969 the program's focus changed to a residential treatment program for emotionally disturbed children. In 1981, the CF&S Warwick Pond/Lakeside remedial programs were terminated.

36. During the 1951-81 period, in keeping with the initial donors' charitable purposes and the uses mentioned in paragraph 26, CF&S permitted the community at large to use the property at issue for boating, fishing, bicycling, swimming, hiking, ice-skating, sailing, bird-watching, soccer, baseball, basketball, nature education, photography, picnicking and other community recreational purposes. Such activities continued after the 1981 closing of the property's facility house although less frequently after the purported conveyance(s) of June 12, 1987 and the subsequent stationing of a vigorous German Shepherd on the premises.

37. Among the community groups which have used the property for recreational purposes during the past thirty-five years are those connected with, if not sponsored by, the Boy Scouts, Girl Scouts, (including Hoxie Troop 517), Little League, the Warwick Recreational Department, St. Timothy's Church and the Rhode Island Audubon Society. Many other community children and adults have used the premises on a less organized basis. During the 1951-81 period CF&S and community officials encouraged interaction and friendship among Lakeside home residents and other neighborhood children. Adult community members, including the Lions Club and Rotary volunteers, donated time, money and clothing in support of CF&S' Lakeside/Warwick Pond programs.

Excerpt from Plaintiffs' May 19, 1988 Memorandum in Opposition to Defendant's Motion for Summary Judgment.

Plaintiffs' Right to Proceed

Through this suit the plaintiffs seek to prevent serious, monetary, recreational and environmental damage to their homes and their neighborhood which, as confirmed by expert opinion, will surely happen if this charitable, recreational, primarily open land is misappropriated for private development and exploitation. (Amended verified complaint, pars. 2, 26, 26, 29, 35-37, 43, 63-64, and 73-77 and annexed table sources; plaintiffs' supplemental answers to CF&S interrogatories, pars. 4(b), 5, 12, 13 (p. 23), 18 and 28; Huling affidavit, pp. 6-7)

All individual plaintiffs are Warwick residents and own homes on or near Warwick Pond and the Lakeside property. Plaintiff Warwick Land Trust is a non-profit R.I. corporation with a registered office at 31 Lakecrest Drive . As residents on or near Warwick Pond they have a special interest in this suit. Their personal and class action claims, particularly those for environmental damage satisfy Rule 23 requirements and have special legislative and other distinguished support (Amended verified complaint pars. 4-5, 37, 63-64, and 73-78 and annexed table sources; plaintiffs' supplemental answers to CF&S interrogatories, par. 18; Huling affidavit, pp. 1, 6-7 and annexed Audubon Society letter; Rule 23, R.I. Rules of Civil Procedure; R.I. Gen. Laws, Sections 10-20-1 and 10-20-10; *Johnston's Businessmen's Association* v. *aaRussillo*, 108 R.I. 257, 274 A.2d 433 (1971); unanimous special session land use legislation adopted by the General Assembly in September 1987 and the overwhelming support of the R.I. electorate on November 3, 1987)

In keeping with *Berberian* v. *Solomon* 122 R.I. 259, 405 A.2d 1178 (1979) (CF&S memorandum, p. 25), the plaintiffs have made the requisite allegations from which standing may be inferred, i.e. their own "injury in fact" and their own "personal stake" in this controversy. With one corporate exception, all are tax paying owners of homes on or near Warwick Pond and one plaintiff's property abuts the Lakeside acreage. (Amended verified complaint pars. 4-5; supplemental answers to interrogatories, Nos. 2 and 18.)

CF&S does not mention plaintiffs' verified statement that

homes on or near Warwick Pond (to the west of Warwick Avenue) would lose at least 10% of their market value should defendants ever proceed with their intended development. [Supplemental answers to CF&S interrogatories, No. 18 (p. 30)]. Indeed, the value of adjacent open land to neighboring residences has been confirmed by recognized experts including Alfred L. Hawkes, executive director of the Audubon Society of Rhode Island and Richard C. Youngken, East Greenwich Town Planner. (Huling affidavit and annexed October 29, 1987 *Pendulum* article.) Following similar arguments last August 24, 1987 the Court (Bulman, J.) overruled CF&S contentions and found that the plaintiffs had sufficiently demonstrated their right to proceed and "get their licks in." *Cf., partial* transcript annexed to CF&S' present papers. That ruling should not now be "disturbed". Cf., *Salvatore* v. *Major Electric & Supply, Inc.* A.2d 353 at 355-56 (R.I. 1983). CF&S Memorandum p. 11.

The plaintiffs' subsequent prosecution of this case has been most diligent as a review of the Court's docket and files will readily confirm. Their impressive historical research, conducted by the individual plaintiffs themselves, is reflected in their January 24, 1988 supplemental answers to interrogatories and their March 31, 1988 amended verified complaint. Several hundred persons have responded to their litigation fund raising appeals and more such events are being planned. (Huling affidavit; supplemental answer to interrogatories, No. 28) Judge Bulman made no mistake recognizing plaintiffs' right to proceed.

Even assuming, their homes proximity to Warwick Pond and the Lakeside property notwithstanding, that the plaintiffs have not demonstrated injury distinct from the public in general, which is denied, their amended verified complaint (like their initial complaint) presents urgent issues which may be rendered moot if the plaintiffs are not allowed to proceed. Substantial community support notwithstanding, no R.I. governmental agency or department (or anyone else) has offered to carry on this litigation to protect this environmentally unique property [Supplemental answer to interrogatory 18 and annexed Audubon Society (Hawkes) letter; Huling affidavit.] This is, therefore, the precise situation which allows designated plaintiffs to proceed even without allegations of

personal injury. *Sennott* v. *Hawksley,* 103 R.I. 730, 241 A.2d 286 (1986) and discussion contained in *Berberian, supra* at 1180-81 and *Blackstone Valley Chamber of Commerce* v. *Public Utilities Commission,* 452 A.2d 931 at 932-33 (R.I. 1982).

Certainly, the Attorney General's failure to commence this or any similar action is no bar. Indeed, the plaintiffs themselves joined the Attorney General as a party — in his representative capacity — for the express purpose of ensuring that complete relief may be granted. (Initial complaint, par. 7; amended verified complaint, par. 11) Having been made a party, the Attorney General and his office has been given every opportunity to participate in this case and thus ensure that the public's rights are fully protected. This is all that the Rhode Island decisions cited by the defendant require. See, especially, *Powers* v. *Home for the Aged Women,* 55 R.I. 1987 at 192, (1935) and *Newport Hospital* v. *Harvey,* 47 R.I. 382 at 383, 133 A 648 (1926).

Such has long been the general rule. As stated in *Annot.,* 62 *A.L.R.* 881, 885-86, ("Who may maintain suit or proceedings to enforce or administer benevolent or charitable trust."), the primary commentary to which, the one cited by CF&S (p. 8), is but a supplement:

> "Some cases, at least in the language of the opinion, appear to support the proposition that the attorney general is the only person entitled to maintain a suit to enforce or administer a charitable or benevolent trust. But this is not the general rule, as there are numerous cases set out elsewhere in the annotation in which the action has been held maintainable by other parties than the attorney general; and it seems to be sufficient if the latter is a party to a suit to enforce or administer the trust, either as plaintiff or defendant, for in either event the interests of the public at large, or of the indefinite class of the public who constitute the beneficiaries, are represented and protected."

Excerpts from Plaintiffs' Brief to Rhode Island Supreme Court (No. 88-0426), filed January 13, 1989.

Statement of Facts

The following facts are supported by substantial if not uncontradicted evidence:

The Providence Society for Organizing Charity ("Society") began conducting community oriented recreational and remedial programs around the turn of the century. These programs had been handicapped by the lack of a permanent location controlled by the Society. (Plaintiffs' supplemental answers to interrogatories verified January 25, 1988, No. 5, pp. 4-5 and appended documents cited therein).

By vote of the Society's board of directors, October 17, 1911, a committee was appointed to find a site "for a permanent summer visiting place and convalescent home." Two months later in December, 1911, the committee reported that the Lakeside Sanatorium at Hoxsie had been found most desirable. (Plaintiffs' supplemental answers *supra* No. 5 at p. 5).

A second Society committee, also including the late Henry D. Sharpe, was appointed to raise the necessary money. Fifty seven community members responded to the Society's solicitation and donated around $10,000.00 to acquire the Lakeside property. With February, 1912 board approval title was temporarily held in the name of the Society's president (and Brown University's) W.H.P. Faunce, as trustee. A public announcement of the Society's acquisition was made through *Providence Journal* article on February 29, 1912:

"SUMMER HOME FOR THE POOR

Charity Society Gets Lakeside Sanitorium at Hoxsie

FOR MOTHERS AND CHILDREN

Funds for Purpose Solicited by Subscription Making it Possible to Get Property Without Interferring with Regular Work of Society for Organizing Charity – 57 Contributors."

[Plaintiffs' supplemental answers, *supra* No. 5 at pp. 5-6; Paul Huling affidavit, sworn to May 19, 1988 p. 5. (R.A. 10-11, 90).]

The Society recognized its resultant fiduciary obligations from the very beginning. Two weeks after the Society's public

announcement, at a March 12, 1912 executive committee meeting, it was:

> "...voted that it was the general sentiment of the committee that the property be vested in a Board of five trustees to be administered by them and under an indenture for the purpose for which the money was contributed and in harmony with this Society."
> (Plaintiffs' supplemental answers *supra*, No. 13, p. 19.)

The Society's trust acknowledgement took ultimate form through amendment to its by-laws at the October 25, 1912 annual meeting. The by-law amendment placed the 1912 initial Lakeside property (and, by its terms, the similarly acquired 1916 adjoining parcel) under the "management and control" of a newly constituted five member Board of Real Estate Managers, including Mr. Sharpe, Preston H. Gardner and George H. Huddy, Jr., Esq. Only after the annual meeting and by-law amendment did Dr. Faunce deed over the Lakeside parcel which he had been holding as trustee. The trust purpose of the newly constituted Board is also confirmed by the 1920 report of another Society committee (including Messrs. Sharpe and Gardner) referring to "our Society being in a position of a trustee for the use of the Home for those purposes for which the property has been placed in our care" and "the by-law under which the real estate is held in trust by us..." (Plaintiffs' supplemental answers, *supra* No. 5 at pp. 6-8, No. 6 at p. 12; see R.A. 12-13).

The Society also recognized its trust title and fiduciary duties in its 1920 and 1926 leases of the Lakeside property to the Providence Tuberculosis League, a former Society division, by then separately incorporated. Indeed, the 1920 Sharpe/Gardner committee admonished that such leasing must be "under such terms as are appropriate in view of our Society being in position of a trustee..." and "have the written approval of the several real estate managers." Both leases provided that the premises be used solely for charitable work to the Society's satisfaction. (Plaintiffs' supplemental answers, *supra* No. 5 at pp. 7-8).

In 1935 the Tuberculosis League requested that it be deeded the Lakeside property. In response the Society prepared a 24 page memorandum and appendix summarizing the Lakeside

history. [A copy, entitled "Summer Outings" and "Appendix", is annexed as Exhibits 6-7 to the plaintiffs' supplemental answers *supra*.] The foregoing report was submitted to Mr. Huddy, by then Honorary Counsel of the Society. Mr. Huddy's response was:

> "...that in view of the conditions under which [the Lakeside] property was purchased, the ... Society was obligated to continue to hold title as trustee for those purposes for which the property has been placed in its name." (R.A. 14-15).

The Society, heeding Mr. Huddy's counsel, decided not to transfer title to the League but to renew its lease for ten more years. (Huling affidavit, *supra* pp. 5-6; plaintiffs' supplemental answers *supra;* R.A. 90-91)

In December 1946, the Society again recognized its fiduciary obligations regarding Lakeside, this time in response to a suggestion that the property be deeded to a children's hospital center. Upon written recommendation of its president, former R.I. Attorney General Charles P. Sisson, the Society responded affirmatively, provided the "proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society." (Plaintiffs' supplemental answers *supra,* No. 13 at page 20; R.A. 16-17).

During 1946-51, the Society, the Tuberculosis League and other social agencies, including the Providence Council of Social Agencies and CF&S, considered Lakeside's future. In particular, the Society (now known as Family Service, Inc.) its Board of Directors and its Board of Real Estate Managers, carefully considered the "best use" to be made of the Lakeside real property "having regard to the welfare of the community generally and the carrying out, as near as may be, of the charitable purposes which impelled the contributors above mentioned to bring about the conveyance thereof to [the Society]..." (Plaintiffs' supplemental answers, *supra* No. 8; Family Service's February 1951 *cy pres* petition, pars. 5-6, R.A. 21-22).

All of the above agencies, subject to obtaining Superior Court authority, approved Lakeside's transfer to CF&S. They did so because CF&S for many years had been carrying out work with children in Rhode Island and would now administer and

conduct such programs at Lakeside, including programs similar to those conducted under the Society's aegis. (Plaintiffs' supplemental answers *supra*, Nos. 8 and 10; R.A. 21-22, 75-76).

Concurrently, the R.I. General Assembly was pursuaded to amend the CF&S articles of association to empower CF&F to "take and *hold* ... real estate". (Emphasis added) The proposed amendment contained the specific recital and representation that CF&S was organized and operated "exclusively for charitable purposes..." (Plaintiffs' supplemental answers, *supra*, No. 9; R.A. 18).

In February 1951, upon notice to the Attorney General "representing the people of the State and the public generally and ... with general oversight of the administration of charitable trusts," the Society petitioned the Superior Court for *cy pres* ("as near as may be") authority to convey the Lakeside property to a successor charity, CF&S. (R.A. 19-23). In reliance upon the representations contained therein, the R.I. Attorney General (William E. Powers) filed a response which effectively consented to the requested relief. (Plaintiffs' supplemental answers, *supra* Nos. 10 and 11; R.A. 24-25).

The Superior Court accepted jurisdiction and "on the bill, answer and proof" entered its February 16, 1951 decree (Walsh, P.J.) authorizing conveyance to CF&S (R.A. 26). [Pursuant to subsequent 1951 *cy pres* decree, *Providence Tuberculosis League v. Powers Providence Co.*, Eq. No: 21655, May 29, 1951, transfer of the League's personalty and endowment fund to CF&S was authorized. Years later, pursuant to a third Superior Court *cy pres* proceeding, CF&S received additional trust funds for Lakeside programs, *R.I. Hospital Trust v. Israel* 119 R.I. 298, 377 A2d 341. 343 (1977).]

The Superior Court's February 16, 1951 *cy pres* decree provided:

> "This cause came on to be heard on the bill, answer, and proof and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family

> Service, Inc. the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes."
>
> (R.A. 26).

The subsequent April 1951 recorded deed transferring the Lakeside property, without monetary payment*, from the Society to CF&S, both identified therein as charitable corporations, specifically provided that the Society's transfer was:

> "...pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951 in the case entitled *'Family Service, Inc. v. William E. Powers*, Attorney General of the State of Rhode Island, Eq. No. 21550..."

and that the property was:

> "...to be held by said Children's Friend and Service for its general uses and purposes."
>
> (R.A. 27-30).

From 1951 through 1981, when its Lakeside remedial programs were terminated, CF&S, with community and financial support, provided emergency and shelter care for needy children. During the same thirty year period, as the Society had previously allowed during its tenure, CF&S also permitted the community at large to use the property for a variety of recreational purposes. Indeed such community use continued through June, 1987. (Plaintiffs' supplemental answers, *supra*, Nos. 4, 5 and 12, at p. 4-6, 9-11 and 17-18; Huling affidavit, *supra*, p. 7; R.A. 92-95).

Nevertheless, without notice to the Attorney General and without seeking Superior Court authority, CF&S decided to transfer Lakeside to real estate developers, i.e. the challenged transfers of June 12, 1987 to defendants Sherry and R & F Associates. (Plaintiffs' supplemental answers *supra*, Nos. 13-18 and 25; plaintiffs' verified amended complaint pars. 38-53; Huling affidavit, *supra*, pp. 3-4; R.A. 88-89).

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*R & F's Rule 16 (h) statement that CF&S *purchased* the land is erroneous, as the deed itself confirms. (R.A. 28).

Point I

The Decision Should Be Reversed

The "trust property" phrase in the codified R.I. *cy pres* statute (R.I.G.L. Section 18-4-1) refers not to an express trust, as the defendants' argued below, but rather to "property held upon charitable trust." *City of Providence v. Payne,* 47 R.I. 444, 455, 133 A. 621 (1926).

A charitable trust is not governed by the technical requirements and characteristics of other trusts. Such words as "trust" and "trustee" are not required. The only requirements for *cy pres* jurisdiction are general charitable intent and public utility purpose. For more than one hundred years such charitable gifts have been highly favored and, whenever possible, supported by R.I. courts. Inquiry as to charitable intent and public purpose is broad, is not limited to bare deeds or testamentary language and includes extrinsic evidence. If such inquiry reveals a "gift ... for the purpose and not the person" and if the purpose is that of "[unstained] public usefulness", its charitable character "insures its validity." *Pel v. Mercer* 14 R.I. 412, 435-36, 438 (1884). *R.I. Hospital Trust v. Benedict* 41 R.I. 143, 147-48, 150, 103 A. 962 (1918). *South Kingstown v. Wakefield Trust Co.* 48 R.I. 27, 30 134 A. 815 (1926). *R.I. Hospital Trust v. Williams* 50 R.I. 385, 388, 390-91, 393, 148 A. 189 (1929). *Thomas v. General Board of the Church of the Nazarene* 76 R.I. 197, 68 A.2d 44 (1949). 15 *Am Jur* 2d *Charities,* Sections 5-6, (1976).

When an organization solicits and receives funds to acquire real property for public charitable purposes, as the Providence Society for Organizing Charity did to acquire the Lakeside property, it holds title as trustee and cannot divert the property to any use other than public charity. *Samuels v. Attorney General* 370 N.E. 2d 698 (Mass. 1977). *O'Brien v. Hospital Association* 96 O.S.1, 116 N.E. 975 (Ohio, 1917). *Niles Post v. Memorial Hospital Association* 65 Ohio App. 238, 29 N.E. 2d 631 (Ohio 1936). R.I.G.L., Section 5-53-5.

As stated in *Samuels, supra* at pages 700-701:

> "The statement of purpose in the 1922 convention vote to establish the Fund was an express commitment of the Fund to the purposes set out. The commitment is not less binding if an express trust was not created ... Once money

> or other property was given to the Fund for the stated purpose, use of the property was confined to the particular purpose for which the money or other property was given, and could not be diverted to other purposes by a subsequent amendment of the vote. (Citations omitted.)"

Similary in *O'Brien, supra* at page 7:

> "Where private property is temporarily used exclusively for purposes of public charity, it may be withdrawn from such use at any time at the will of the owner, but that cannot be done with the property in question. It was purchased with trust funds donated for the purposes of a public charity hospital, and is impressed with that trust. It cannot be withdrawn from the uses of this trust at the will of the trustee, or of any or all of the donors of the fund. ...The title to this property is in this corporation only as a trustee for the purposes of this trust, and it cannot divert it to any use other than public charity."

The foregoing duties are also reflected in the terms and underlying policy of R.I.G.L., Section 5-31-1 *et seq* and similar statutes of more than thirty other states regulating charitable solicitation. E. Fisch, *Charities and Charitable Foundations* Section 740 (1974).

For forty years, the Providence Society for Organizing Charity recognized and performed its fiduciary duties respecting Lakeside by:

> (a) placing the "management and control" in a special, newly constituted board of trustees ("Real Estate Managers"),
>
> (b) through lease provisions ensuring its operation for charitable work,
>
> (c) by retaining its trust title to the property and, most significantly,
>
> (d) by using the property exclusively for community charitable purposes.

Restatement (Second) of Trusts Section 348, Comments (a) and (b); 4 A. Scott on Trusts (3rd ed 1967) Section 364, 367 and 379; E. Fisch, *supra* Sec. 512, 513. *Mormon Church v. United States* 136 U.S. 1, 59 (1889).

Thus, the same result follows even if it be assumed *arguendo* that the Society did not incur charitable trust duties through its solicitation and acceptance of specially donated community funds. When coupled with the Society's chartered, charitable purposes (R.A. 19), the Society's subsequent declarations, actions and property use certainly suffice to create a self-imposed charitable trust. Restatement *supra*, Sec. 349 (a), [citing *Brice v. All Saints Memorial Chapel*, 31 R.I. 183, 76 A. 774 (1910)], and 351, Comment b. 4A. Scott, supra, Sections 349, 351, (p. 2794), 352 and 367. *Blocker v. State*, 718 S.W. 2d 409, 416 (Tex. App. - Houston [1st Dist.] 1986). R.I. General Laws, Section 18-9-4.

The Superior Court's 1951 acceptance and exercise of its *cy pres* authority over Lakeside was most appropriate. In 1951, CF&S was given a charitable trust title which was as restricted as the title (a) the Providence Society for Organizing Charity had held for Lakeside and (b) the school district had received from Elisha Watson in *South Kingstown v. Wakefield, supra* at 32. The court granted CF&S no unilateral authority to transfer the property ("to be held"). Moreover, any such construction attributed intentions to Judge Walsh which are in conflict with (a) the Supreme Court's ruling in *Wakefield*, (b) other decisions and authority confirming the Superior Court's exclusive, continuing jurisdiction*, and (c) the mandatory language of the *cy pres* statute itself ("shall"). [Surely, Real Estate Managers Sharpe, Gardner and Huddy would not have signed the deed if any such construction had been intended. R.A. 27-30.]

Judge Walsh was mindful of *Pell, Benedict, Payne, Wakefield, Williams* and *Thomas* (1949) *supra* when he entertained the Society's 1951 *cy pres* petition and the accompanying proof. (R.A. 26). The *cy pres* petition statement that there was no trust in the formal technical sense, is of no significance in view of the "charitable purposes which impelled the contributors to

*E.g. *Wakefield supra* at 32; *City of Providence v. Powers*, 83 R.I. 512, 514, 120 A.2d 811 (1956); *Faunce v. People's Savings Bank*, 46 R.I. 75, 80 124 A. 731 (1924); *Niles Post, supra* at 244; *Belcher v. Conway*, 179 Conn. 198, 425 A2d 1254, 1257-58 (Conn. 1979) and 15 *Am Jur 2nd, Charities*, Section 159.

bring about the conveyance" (Petition, par. 6; R.A. 22) and the "charitable purposes for which said real estate (had) "been held and used by the [initial charitable donee]." (February 16, 1951 order; R.A. 26).

Once the *cy pres* step has been initiated, the *cy pres* statute and charity law generally requires that all subsequent transactions regarding the title and the use of such property must be taken pursuant to proceedings, orders and decrees of the Superior Court so that such charity "may not fail..." Section 18-4-1 provides;

> "In all cases of charitable gifts of real or personal estate, whether by deed or will, where the purposes of the donor cannot be literally carried into effect, a complaint may be filed for a *cy pres* application of the trust property; and thereupon all such proceedings, orders and decrees *shall be had and taken* in said suit, to carry out the intents of the donor as near as may be, *that such charity may not fail*, and to this end application as aforesaid may be made in the same complaint for appointment of new trustee or trustees under or pursuant to the provisions of sections 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court."
> (emphasis added)

Significantly, no case has been found and the defendants have cited none, where once *cy pres* has been invoked, a successor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld.

Assuming *arguendo* that the Superior Court was mistaken in its 1951 acceptance and exercise of *cy pres* authority because Lakeside is not "trust property" — a difficult proposition to contemplate in view of the documented historical facts summarized above and CF&S' repeated admissions of trust title in its August 1987 memorandum* (R.A. 38-40) — the defendants are estopped and barred and the Superior Court is without power to overrule its 1951 *cy pres* decree. All necessary

*In a similar, almost *verbatim* restatement in its subsequent 1988 summary judgment memorandum, CF&S inserted the qualifying words "alleged" or "any alleged" trust. Compare R.A. 38-40 with R.A. 79-80.

parties asked the court to exercise power in an area where the court was authorized to act. (R.A. 23-25). CF&S accepted trust title pursuant to authority vested by the court's *cy pres* decree. (R.A. 26-28). CF&S and its privies may not now be heard to say that the 1951 court was mistaken. The defendants' position literally ignores the finality and the conclusiveness of judgments and undermines the permanency of charitable gifts. (See *Petition of Downer Home* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-449, (1975); *R.I. Dairy Queen v. Burke* 101 R.I. 644, 647, 226 A.2d 420 (1967); *Bradford v. Burgess,* 20 R.I. 290, 295-296 (1897); *DiPrete v. Vallone,* 70 R.I. 286, 289, 38 A2d 769 (1944); *Air-Lite Products, Inc. v. Gilbane Building Company,* 347 A. 2d 623, 629-31 (R.I. 1975); *Super.* R. Civ. P., 60 (b) and 6 (b); RIGL, Section 9-21-2 and 9-21-6; 1 Kent *R.I. Civ. Proc* at Section 50.10; RIGL, Section 18-4-1 *supra.**

The Wisconsin Supreme Court gave short shrift to similar arguments in *Petition of Downer Home, supra*:

> "We deal here and now with the consequences, not the validity, of the 1965 court order. However, it is clear that the court in 1965 applied the doctrine of *cy pres* to redefine the purpose of the trust and the authority of the trustee. So we are puzzled by the state's now contending that *cy pres* is not applicable to this trust fund after sale of the Downer Home*** The State could have sought termination of the trust in 1965 when the Downer Home was sold. It is not likely that it would have succeeded, but, having consented to the sale of the real estate and modification of trust purposes in 1965, it certainly cannot now claim that *cy pres* was then inapplicable."

At most, the defendants have conjured up a mixed question of law and fact concerning the doctrine of charitable trusts. The court below should not have granted summary judgment, particularly where (a) pleadings, affidavits, documents and conflicts must be viewed in a light most favorable to the opposing party and (b) important discovery, including deposition notices and document requests addressed to the moving parties themselves, remain outstanding.

**In re College Street,* 11 R.I. 472, (1877) would support no different result becuase (a) all necessary parties were before the court and within its subject matter jurisdiction and (b) all such parties (and CF&S) requested (or consented to) the court's *cy pres* action. (R.A. 23-30, 66, 68, and 72, June 13, 1988 transcript 21, 27-29; *College Street supra* 474).

Excerpts from Plaintiffs' Petition for Reargument to Rhode Island Supreme Court (No. 88-0426), filed February 28, 1989.

Standing

Judge Bulman determined (and Judge Bourcier made no contrary summary judgment ruling) that the plaintiffs had made a sufficient showing of their standing to bring (and proceed) with this action. (Plaintiffs' January 13, 1989 brief 3-4, 14-15; see also R.A. 81-86). Plaintiffs demonstrated their own "injury in fact" (both economic and non-economic) and their "personal stake" in the controversey. Plaintiffs also presented urgent public issues which might be rendered moot if they were not allowed to proceed, the precise situation which allows representative plaintiffs to go forward without allegations of personal injury, (Plaintiffs' brief *supra* 15 and R.I. Supreme Court decisions cited therein; R.A. 84 and Audubon Society letter, R.A. 93, also annexed hereto). Indeed, the very failure of the Attorney General (or others), to commence or join in this suit to protect such unique recreational and environmental property is positive proof of the alternate standard (R.A. 84, 88-89, 91-93).

* * *

Home for Aged, Harvey and the ALR annotation *supra* were briefed by both sides before Judge Bulman (as well as Judge Bourcier). Plaintiffs' August 21, 1987 memorandum 7-8; R.A. 37-40, 81-85. Although duly served by both sides, the Attorney General submitted no papers and did not appear at the August 24, 1987 oral argument before Judge Bulman (The Court was informed, by CF&S counsel, that while the Attorney General did not join in CF&S; motion he would not "object" if the Court, acting without his urging, should choose to grant CF&S' Rule 12(b)(6) motion, R.A. 31-41.)

Judge Bulman, of course, denied CF&S' 12(b)(6) application — primarily addressed to plaintiffs standing — and held that the plaintiffs were entitled to proceed with full pre-trial discovery ("get their licks in"). Plaintiffs brief *supra* 14; R.A 89-92. No appeal was attempted and, most significantly, no effort made by any party to invoke certification. The Attorney General could have readily taken this step even without court permission if, as R.I.G.L. 19-24-27 provides, he was prepared to certify that in his opinion, the question was:

> "...of such doubt and importance and so affects the merits of the controversey that it ought to be determined by the

supreme court before further proceedings..."

Clearly, the Attorney General was *not* so inclined. However, if that step had been taken in 1987 and assuming *arguendo* that this court, upon full briefing, would have reached the same erroneous February 23 summary result, the plaintiffs would have at least been spared considerable time, effort and expense. As things turned out, having negotiated this "access barrier" (standing) the plaintiffs then proceeded to demonstrate, in spades, the "concrete adversity" that sharpens issues, the very objective which the "injury in fact"/"personal stake" test is designed to ensure. See, especially, *Blackstone Valley Chamber of Commerce v Public Utilities Commission,* 452 A.2d 931 at 932-33 (R1 1982) — plaintiff's brief *supra* 15.

Simply put, the court's February 23, 1989 summary standing ruling is (a) contrary to the Rhode Island statute (18-9-5) and the case law; (b) contrary to the standing rule's most basic purpose; and (c) manifestly unfair to most diligent plaintiffs.

* * *

Summary Judgment

Judge Bourcier wrote no opinion. Although he recognized in this Court's February 23 decision, his *sole* ultimate summary judgment finding was that Lakeside was "not subject to the application of the *cy pres* doctrine of law which pertains to trust property..." (R.A. 1-2). The "trust property" phase of the RI *cy pres* statute (R.I.G.L., Section 18-4-1, *infra*) refers not to an express trust, as the defendants argued below (and still do — see CF&S brief 15), but rather to "property held upon charitable trust." This Court so noted in *City of Providence v Payne,* 47 R.I. 444, 455, 133 A.621 (1926). Plaintiffs' brief *supra* 9.

Presiding Justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by its initial charitable recipient, the Providence Society for Organizing Charity (now known as Family Service, Inc.) and, therefore, within Superior Court *cy pres* authority. Judge Bourcier clearly thought that Judge Walsh had been mistaken in making that determination and, because it pertained to jurisdiction, that he was free to rule otherwise — 37 years later and even on summary judgment. See June 13, July 1, 1988 transcript 21, 27-29, 39 ["That is jurisdictional when you come down to it. Jurisdiction can be raised any time, notwith-

standing the erroneous assumption of jurisdiction in the previous situation. That concludes the matter. We'll stand in recess." *Id* 39]

Judge Bourcier was wrong for two reasons — (1) *res judicata* and (2) summary judgment principles. Certainly, Judge Walsh possessed jurisdiction in the "fundamental sense" as defined in two recent decisions of this Court, *Hartt v Hartt* 397 A.2d 518, 523 (RI 1979) and *State v Souza* 456 A.2d 775, 779 (RI 1983). (CF&S' brief at 16-17 and to which the plaintiffs called attention during oral argument). All necessary parties were before Superior Court and asked the court to exercise power in an area where the court was authorized to act. The defendants were therefore barred and estopped and the Superior Court lacked authority to overrule its 1951 determination. [This was not a situation where the court had declared counsel a "General in the Mexican Army" a crucial distinction not recognized by the court below, (argument transcript 29, 39).] See also *Auto-Lite Products, Inc. v Gilbane Bulding Company*, 347 A 2d 623; 629-31 (RI 1975), and *Petition of Downer Home* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-49, among other decisions and authority previously noted and quoted, in plaintiffs' prior memorandum, 13-14.

* * *

Attorney General's Position

During the February 13 oral argument and again in its February 23 order/decision, the Court was visibly impressed by an apparent Attorney General "opinion" or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development (*Id* 2). The record in this case contains *no* such opinion or finding — written or oral. Indeed, CF&S' ambiguous memorandum statement notwithstanding (p 13), the Attorney General was given *no* advance notice of the proposed sale.* (Huling affidavit, R.A. 89-90. See also CF&S' prior 1987 comments before Judge Bulman, R.A. 34, 38).

There are, however, other declarations and opinions -- in the Lakeside historical record and in the applicable case law — which do command the Court's attention. These include;

* * *

*CF&S' failure to give the Attorney General specific statutory, Superior Court notice is, in itself, grounds for nullifying the June 1987 conveyance. *Donnelly v Israel* 113 R.I. 27, 317 A.2d 443 (1974) Plaintiff's January 13 memorandum, *supra* 15 n.

Thus, going beyond the issues among the parties herein, the Attorney General's "sole standing" aspect of the Court's February 23 ruling, when coupled with the deference to, if not acceptance of, a thus-far undocumented Attorney General opinion or finding, represents a most unwise erosion of the Superior Court's longstanding ultimate responsibility for *cy pres* application.

Plaintiffs' Initial Complaint – Class Action, verified August 3, 1987 (appended documents deleted).

STATE OF RHODE ISLAND KENT, SC.	:	
WARWICK LAND TRUST, INC., PAUL HULING, JEANNE M. FOSTER EILEEN AUGHTON, and KATHLEEN PREISS, PLAINTIFFS	:	
VS.	:	C.A. No.: 87-0811
CHILDREN'S FRIEND AND SERVICE, INC., FRANK P. SHERRY, R & F ASSOCIATES, and JOHN DOES, ONE through FIVE, DEFENDANTS	:	
and JAMES O'NEIL, in his capacity as Rhode Island Attorney General	:	

COMPLAINT – CLASS ACTION

Plaintiffs, by their Attorneys, PEARLMAN & VOGEL, respectfully allege:

Parties

1. Plaintiff The Warwick Land Trust, Inc, is a non-profit, tax-exempt Rhode Island corporation located at 31 Lakecrest Drive, Warwick.

2. Plaintiffs Paul Huling, Jean M. Foster, Eileen Naughton and Kathleen Preiss are residents of Warwick, Rhode Island, and at all material times the owners of homes located on or near Warwick Pond.

3. Defendant Children's Friend and Services, Inc. ("Children's Friend"), is a Rhode Island non-profit corporation, organized exclusively for charitable purposes pursuant to Article III of Chapter 116 of the General Laws of Rhode Island, with an office at 2 Richmond Street, Providence.

4. Defendant Frank P. Sherry is a resident of 61 Wright Lane,

North Kingstown, Rhode Island.

5. Defendant R & F Associates is a Rhode Island partnership with an office at 1345 Warwick Avenue, Warwick, Rhode Island.

6. The Defendants John Doe One through Five are persons, presently unknown or not yet precisely identified, who are also believed to have aided and abetted or otherwise participated in the wrongful conduct hereinafter alleged.

7. James O'Neil is Rhode Island Attorney General. He is named as a party for the sole purpose of ensuring that complete relief may be granted.

FACTS

8. The plaintiffs' complaint is focused on some twenty acres located on the northerly end of Warwick Pond referred to in an annexed decree of this Court, entered February 16, 1951, and more particularly described in two purported successive instruments of conveyance also annexed hereto, each dated June 12, 1987.

9. Commencing more than seventy years ago and continuing until very recently, the foregoing Warwick Pond property, its land and building, and their use, has been restricted and devoted to remedial, recreational, and other charitable purposes.

10. By deeds executed in 1912 and 1916 the foregoing property was given to the Family Service, Inc. ("Family Service"), a charitable corporation of the State of Rhode Island whose chartered purpose was "organizing charitable work, diminishing pauperism and improving the condition of the poor."

11. The grantors were persuaded to make the foregoing charitable contributions because of the charitable use and purpose which would thus be served.

12. For some thirty-odd years thereafter under the aegis of Family Service, the foregoing Warwick Pond property was used for the benefit of community children, particularly those in need of medical care and recreation.

13. In or about 1950, Family Service concluded that the welfare of the community generally and the charitable

purposes which had caused the property's prior owners to convey the premises could best be served by transferring the land and building to the defendant Children's Friend "to be held by [Children's Friend] for its general use and purpose."

14. As indicated above in paragraph 3, Children's Friend was organized "exclusively" for charitable purposes. Upon this specific representation and for the apparent purpose of facilitating the aforementioned proposed transfer, the Rhode Island General Assembly amended Children's Friend's articles of incorporation to "take and hold ... real estate." See annexed statutory amendment, January Session, 1950.

15. Thereafter in February 1951, Family Service, upon notice to the Attorney General, petitioned this Court (Providence SC., No. 21550) for leave to transfer the aforementioned Warwick Pond property to Children's Friend, "to be thereafter held and used by it for its general use and purposes." In its pleading Family Service made specific reference to the beneficial work which Children's Friend had been carrying on for many years which would now be centered at the Warwick Pond property.

16. By reason of the foregoing representations Attorney General Powers filed a response, in effect consenting to Family Service's petition.

17. By the aforementioned annexed decree entered February 16, 1951, this Court authorized the proposed conveyance of Children's Friend "to be held for its general use and purposes", the Court noting that such use and holding would be "consistent with the intentions of the persons who caused the conveyance of said real estate to Family Services, Inc." Conveyance to Children's Friend then followed.

18. In accordance with the foregoing charitable purposes, representations, and conditions, Children's Friend, from 1951 until very recently in 1987, used and permitted the community to use the foregoing land and building for the care and development of children, many disadvantaged, and for boating, fishing, swimming, hiking, bird-watching, soccer, baseball, basketball, photography, and other beneficial community recreational purposes.

19. Nevertheless, later in 1987, at times and places unknown to the plaintiffs and without permission of or even notice to the Legislature, the Attorney General, or this Court and

notwithstanding the foregoing longstanding charitable purposes, representations, and conditions respecting its use and retention, the defendants embarked upon and have sought to implement a scheme to transfer and change the property's use from one of public use and enjoyment to one of private use and profit.

Such wrongful conduct is demonstrated by the following facts which, among others, will be brought to the Court's attention:

(a) a statement believed to have been made by the defendant Sherry in or about March 1987 that he had contracted to buy the Warwick Pond property and had filed plans with the City of Warwick to build 64 single-family homes thereon;

(b) an alleged deed of conveyance from Children's Friend, annexed hereto, filed June 12, 1987 at 2:*13* p.m., purportedly transferring the property to defendant Sherry for $900,000;

(c) a second alleged deed of conveyance, also annexed hereto, filed June 12, 1987, 2:*14* p.m., whereby defendant Sherry purportedly transferred the property to defendant R & F Associates for $1,500,000;

(d) a host of subsequent efforts, without disclosing the facts depicted above, to persuade if not pressure various governmental officials prematurely and illegally to permit or acquiesce to physical changes to the property before the Legislature, the Attorney General, this Court, the plaintiffs, and the Warwick community generally realized what was happening to Warwick Pond and its neighborhood.

20. By reason of the premises the plaintiffs, their neighbors, their homes, and their community stand to suffer substantial damages — recreational, environmental, and monetary.

Count I — Declaratory Judgment

21. As described in paragraphs 1-20, the conveyance(s) represented by the purported June 12, 1987 deeds are, and should be declared, void *ab initio*.

Count II — Breach of Trust

22. The wrongdoing depicted in paragraphs 1-21 constitutes

breach of public and charitable trust.

Count III — Fraud and Deceit

23. The wrongdoing depicted in paragraphs 1-22 constitutes fraud and deceit.

Class Action Allegations

24. As indicated above, plaintiffs bring this action individually and on behalf of all Warwick community members, and others, especially those residing on or near or using Warwick Pond.

25. The total number of all class members is so large that their joinder would be impracticable.

26. As residents on or near Warwick Pond, the designated plaintiffs have a special interest in this suit and its diligent pursuit.

27. The questions of law and fact raised herein are common to all members of the class.

28. The claims presented by the designated plaintiffs herein are representative of, if not identical to, the other class members.

29. The designated plaintiffs will fairly and adequately represent the class in that (a) competent counsel have been retained; (b) they have no potential or actual conflict of interest with other possible members of the class; and (c) they can acquire the financial resources to ensure that the interests of the class will not be harmed.

WHEREFORE plaintiffs pray as follows:

1. Declaratory judgment that the foregoing purported conveyances are void *ab initio*;

2. Compensatory and/or punitive damages and forfeiture in sums as the Court may deem appropriate;

3. Reimbursement of their reasonable counsel fees, disbursements, and court costs;

4. Permission to file *lis pendens*;

5. Preliminary and permanent restraining orders; and

6. Other and further relief as the Court deems just.

By Their Attorneys,
PEARLMAN & VOGEL
(Signed) Arlene Violet
(Signed) Robert S. Stritt
Attorneys-at-Law
750 East Avenue
P.O. Drawer 9007
Providence, Rhode Island 02940
Tel.: (401) 726-6200

Dated: August 4, 1987

Plaintiffs Demand Trial By Jury Where Applicable.

The allegations herein are true to the best of my knowledge and belief.

(Signed) Jeanne M. Foster

Subscribed and sworn to me this 3rd day of August, 1987, in the City of Warwick and State of Rhode Island.

(Signed) Deborah Ann Bradford
Notary Public

(7)

No. 89-31

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petitioners' Third Reply Brief In Support Of A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

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QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

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IN THE

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OCTOBER TERM, 1989

No. 89-31

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
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Petitioners

vs

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FRANK P. SHERRY, R & F ASSOCIATES,
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Respondents

and JAMES O'NEIL, in his capacity as
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Additional Party — Respondent

Petitioners' Third Reply Brief In Support Of Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Rhode Island

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Petitioners now reply to the additional party — respondent Rhode Island Attorney General's brief, received by mail on August 13, 1989.*

Summary

The Attorney General's brief is an enigma, replete with omissions and distortions. There is no mention of (1) Lakeside's 1912-16 acquisition with donated funds specially solicited from community members in aid of charitable programs handicapped for lack of permanent location (Petition 4, 23-24, P.A. 11 and 12, 20-23; Petitioners' Second

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*Petitioners' reply to respondent R&F's brief was mailed August 11, 1989. Petitioners' reply to respondent CF&S' brief was mailed August 25, 1989.

Supplemental Appendix, annexed to their reply to CF&S, 6-8 14-26); (2) the initial charitable holder's repeated recognition of its resultant trust responsibilities (Petition 4, 23-24, P.A. 21-23; P.S.S.A. 9-10, 11-17, 22-26) or (3) the R.I. Superior Court's 1951 *cy pres* proceedings in which the Attorney General participated as the sole designated respondent. (Petition 4-5, 24, P.A. 11-12; Petitioners' Third Supplemental Appendix, *infra*, 6)

Regarding petitioners' standing, the Attorney General baldly declares that no injury has been shown. (Brief 7-8) He ignores the petitioners' documented demonstration of substantial, monetary, recreational and environmental damage (Petition 4, 11-14, P.A. 15-16, 23-29; Petitioners' Reply to CF&S 1-2, 4-5, P.S.S.A. 1-5, 14, 16, 18, 20 and 26; P.T.S.A. *infra* 1-2). By claiming that his office has the *sole* right to invoke the judicial process (even when he has declined to do so — as in this case) the Attorney General, (a) misconstrues clear contrary precedents and (b) ignores controlling R.I. statutory and constitutional provisions — which show that he is *not* the sole person who may sue and that making him a party is sufficient. (Petition 6, 8n, 14-16, P.A. 6; Petitioners' Reply to CF&S 5-6)

Regarding summary judgment, the Attorney General disregards Lakeside's 70 years of charitable trust history and use, its longstanding recreational benefit to the surrounding community, his own consent to *cy pres* jurisdiction in 1951*, that the R.I. Superior Court's 1951 *cy pres* decree represents a binding determination that Lakeside was held upon charitable trust (Petition 17-18), the petitioners' outstanding discovery which the movants themselves were resisting or even Rule 56 itself. (Petition 6-8, 17-22).

Regarding his own purported investigation, analysis and findings, which so surprised the petitioners and so impressed the Rhode Island Supreme Court when the subject first surfaced on appellate oral argument last February (Petition 3n, 9-10, 22-23, P.A. 1-3; P.S.S.A. 34-35) and which he declined to clarify in his response to the plaintiffs' February 28 application for reargument (Petition herein 3n, 22n), the Attorney General now *seems* to say that there was no investigation (6), no analysis (6,7) and no written finding or opinion (7). This disclosure should have made below at February 13 appellate oral argument or, at the very least, in the Attorney General's response to the plaintiffs' application for reargument. If such disclosure had been made the result below might well have been different.

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*Provided appropriate proof was presented and, as the decree itself confirms, was in fact given. (Petition 4-5, 24, P.A. 11-12; P.T.S.A. *infra* 6)

The Questions Presented Are Properly Before The Court

Much, if not all of the petitioners' August 25, 1989 reply to CF&S' treatment of this point applies with equal force to the R.I. Attorney General and need not be repeated. (*Id.* 2-4). Petitioners brought this class action* to protect their homes, their neighborhood, their environment, and their quality of life — the most fundamental property and liberty rights which anyone can have (Petition 11). Their demonstration of monetary, recreational and environmental damage, as indicated above, is substantial and fully documented. Yet, the petitioners were shamelessly railroaded. (Petition 2-3, 6-11, 13-14, 17-25). The R.I. Attorney General, citing *Webb v. Webb*, 451 U.S. 493 (1981), says this Court is without power to set straight such fundamental unfairness. He is dead wrong.

Because of the plain error below in breach of federal constitutional standards concerning (1) standing (petition 16-17, 25); (2) the Attorney General's non-record opinion (petition 9-10, 22-25); and (3) the lower courts' handling of Rule 56 summary judgment (petition 18-22, 28), *Webb* gives the Attorney General no help. As Justice Powell, joined by Justice Brennan, noted in his concurring opinion (*Webb, supra* at 502):

> "I joined the Court's opinion with the understanding, however, that the broad statements in it are not to be taken as departing from the rule, reaffirmed just this Term, that the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood v. Georgia*, 450 US 261, 265, n 5, 67 L Ed 2d 220, 101 S Ct 1097 (1981). See also *Vachon v. New Hampshire*, 414 US 478, 38 L Ed 2d 665, 94 S Ct 664 (1974) (finding plain error in an appeal from a state court)."

See also, Wood v. Georgia, 450 U.S. 261, 265n (1981) — cited and quoted in the petitioners' August 25 reply to CF&S (p.4); and *Eddings v. Oklahoma*, 455 U.S. 104, 107 (1982) (O'Connor concurring) cited in the petition at 27-28.

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*The Attorney General erroneously disputes such status. *See*, excerpts from petitioners' amended verified class action complaint, P.T.S.A. *infra* 3-5 and prior excerpts from initial class action verified complaint, P.S.S.A. 36,40.

Denying Petitioners' Standing Was Patently Untenable

The Attorney General's transparent attempt to avoid the application of Rhode Island's adopted federal injury-in-fact standing law by asserting that the petitioners have none, has been noted and refuted, at page 2 *supra* and the sources cited therein. *See also*, the petitioners' reply to CF&S at pages 4-5.

The Attorney General also argues that only his office may sue to enforce charitable trust duties and that all others are disqualified even in situations, like this one, (a) where his office has declined to act and (b) notwithstanding the plaintiffs' demonstration of monetary, recreational and environmental damage. Simply stating this bizarre proposition, refutes it. Certainly, the four principal R.I. Supreme Court cases mentioned (which the petitioners initially cited herein, 18-19) — *Newport Hospital v. Harvey*, 47 R.I. 382, 133 A. 648 (1926), *Powers v. Home for Aged Women*, 55 R.I. 187, 179 A. 610 (1935), *Leo v. Armington*, 74 R.I. 124, 59 A.2d 371 (1948) and *Israel v. National Board of Y.M.C.A.*, 117 R.I. 124, 369 A.2d 646 (1977) — support no such proposition. Indeed, all show that the Attorney General is *not* the sole person who may sue to enforce charitable trust duties and that making him a party, as the petitioners have done, is sufficient.

Most significantly, the Attorney General joins the other respondents in totally ignoring the Rhode Island statute (construed in *Israel, supra*) which the petitioners also cited and reproduced, R.I. Gen. Laws, Section 18-9-5 (Petition 14-15, P.A. 6).* Clearly, Section 18-9-5 (like the foregoing decisions), provides for participation opportunity, nothing more. Having made the Attorney General a party at the outset, the petitioners have done just that.

During the first fifteen months of this litigation, the Attorney General seemed content with his R.I.G.L., Sec. 18-9-5 status. Indeed, in his November 17, 1988 Rule 16(h) pre-briefing statement before

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*Similarly, the Attorney General, like the other respondents, also avoids (a) the collateral reference text authority immediately following R.I.G.L. Section 18-9-5 and the recent decisions in other jurisdictions. (Petition 14-16). The admonition of *Parsons v. Walker*, 28 Ill. App. 3d 517, 328 N.E. 2nd 920, 926 (1975) is especially appropriate here. "('If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. *To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.*' (46 Ill. 2d at 341, 263 N.E.2d at 18)." (*Emphasis Added*)

the R.I. Supreme Court, while otherwise adopting the respondents' contentions, the Attorney General expressed no exception to his having been "included as a defendant in Superior Court as well as a co-appellee pursuant to Rhode Island General Law, Sec. 18-9-5." *See* excerpt, P.T.S.A. *infra* 5.

The decision below, which cited no authority, cannot be reconciled with R.I. Gen. Law, Section 18-9-5 or, indeed, Article 1, Section 5 of Rhode Island's own Constitution.*

In summary, the retroactive ruling below depriving petitioners of access to the courts to protect their homes, their neighborhood, their environment, and their quality of life from the misappropriation of community open land — in favor of an insensitive attorney general, who first refused to help and then, during appellate oral argument, abandoned his passive role and became a tellingly effective adversary, is not only "plainly untenable" but also an outrage. Such an unjust result must not be allowed to stand, especially in these crucial environmental times (Petition 12, 16-17).

Rule 56 Summary Judgment Was Patently Untenable

The Attorney General's treatment of this issue (plaintiffs' petition 17-22) is largely obfuscation. The Court will find no mention of Lakeside's 1912-16 acquisition with donated funds specially solicited from community members in aid of charitable programs handicapped for lack of a permanent location (petition 4,7,9,19,23-24, P.A. 11-12, 20-23); the initial charitable holder's repeated recognition of its resultant charitable trust duties (petition 4,7,9,19, 23-24: P.S.S.A. 9-10, 11-17, 22-26); the 1951 R.I. Superior Court *cy pres* proceedings in which the Attorney General was the sole designated respondent (petition 4-5, 24, PA 11-12; P.T.S.A. *infra* 6); or the fact that the R.I. Superior Court's 1951 *cy pres* decree represents a binding determination that Lakeside was held upon charitable trust and thus subject to the Superior Court's continuing mandatory, exclusive jurisdiction. (Petition 4-5, 17-18, 24-25 P.A. 11-12; P.S.S.A. 27-30, 33-34).

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*Section 5. *Entitlement to remedies for injuries and wrongs — Right to justice.* — Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

Similarly, there is no mention of (1) CF&S' repeated admissions of trust title in its initial August, 1987 memorandum or its clumsy, transparent efforts to withdraw them (petition 6-7, 20-21, P.A. 30-31, 42-43); and (2) the respondents' resistance to petitioners' outstanding discovery, including a pending motion to compel production of complete, unexpurgated copies of CF&S' contemporaneous 1950-51 directors minutes (petition 6-7, 18-22) — documents which might be expected to cast light on CF&S' title expectations and admissions. *See, especially,* P.A. 33-41)

Without mentioning Rhode Island's adopted Federal Rule 56 and summary judgment law (Petition 9n), the Attorney General argues that summary judgment was proper by claiming that Superior Court Justice Bourcier made a finding that the 1951 *cy pres* conveyance was in "fee simple, without any charitable restrictions whatever." Judge Bourcier made no such finding (Petition 8n, 17n 20; P.A. 4-5). However, even assuming that he did, the record shows, at best, nothing more than a mixed question of law and fact and thus, improper for summary judgment determination:

1. Even with important discovery demands outstanding the record contains substantial evidence that Lakeside was charitable trust property. (Petition 4, 18-20, 23-24, P.A. 1-12, 21-23; P.S.S.A. 6-8, 8-10, 11-12, 12-13, 14-17, 22-31)

2. The R.I. Superior Court's (Walsh, P.J.) 1951 acceptance and exercise of *cy pres* authority over Lakeside as charitable trust property was, therefore, most appropriate (Petition 4-5, 17-19, 23-24 P.A. 11-12; P.S.S.A. 22-30)

3. Assuming *arguendo* that the Superior Court was mistaken in its 1951 acceptance and exercise of *cy pres* authority on grounds that Lakeside is not "trust property" — a difficult proposition to contemplate in view of the documented historial facts cited above — the Superior Court was without authority to overrule its 1951 *cy pres* decree. (Petition 4-5, 17-19; P.S.S.A. 29-31, 33-34)

4. The Superior Court's exclusive *cy pres* responsibility regarding charitable trust properties like Lakeside, once the court's authority has been invoked, is continuing and mandatory. (Petition 4-5, 24-25; *South Kingstown v. Wakefield Trust Co.*, 48 R.I. 27, 32, 134 A. 815 (1926), quoted at P.S.A. 1; P.S.S.A. 29-31, 33-34)

5. The Superior Court's 1951 *cy pres* decree was an essential link in CF&S' chain of title, as the April 1951 deed declares.

(Petition 4-5, P.A. 11-12, 13-14; Respondent Attorney General's appendix RA-14, first paragraph, lines 8-13; *see, also,* 46 *Am Jur* 2d, *Judgments,* Sec. 541.)

6. CF&S has admitted the *cy pres* source and the trust nature of its title (Petition 6-7, 20-22; P.A. 30-31, 42-44). Its clumsy attempt, after two years silence, to explain a way such admissions is of no help on summary judgment particularly in view of its refusal to produce the contemporaneous records which one would expect to shed light on CF&S' Lakeside title expectations (Petition 21, petitioners reply to CF&S 7).

7. No decision has been found — before this case — and none has been cited by the respondents or the courts below, where once *cy pres* has been invoked, a successor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld. (Petition 22).

8. In keeping with the R.I. *cy pres* statute (R.I. Gen. Laws Sec. 18-4-1, petition 5) both the February 1951 *cy pres* decree and the court authorized April 1951 deed provided that Lakeside was "...to be *held** [by CF&S] for its general uses and purposes**. (Emphasis added)

*"To hold is defined "a, to have and keep in one's grasp. b, to keep up, support... c, to maintain in a certain position or relationship... d, to keep in reserve or custody..." *The American Heritage Dictionary, Second College Edition* (1982)

**Exclusively charitable (P.A. 11-14); see P.T.S.A. *infra* 2.

9. No respondent has produced a letter, memorandum or other contemporaneous document which shows an intention to convey "fee simple title without any charitable restriction." (Petition 19-21).*

Reliance On An Unpublished Non-Record Attorney General's Opinion Was Patently Untenable

The R.I. Attorney General now *seems* to say that his office made no investigation (brief 6) no analysis (brief 7) and no written finding or opinion (7). This disclosure should have been made below on February 13, 1989 appellate oral argument (when the matter first surfaced — during the Assistant Attorney General's presentation) or, at the very least, in the Attorney General's response, submitted in opposition to the plaintiffs' application for reargument. (See petition herein 3n, 22n). If such disclosure had been made the result below might well have been different. (P.S.S.A. 34-35). Although the Attorney General has still not said just what was done and when, the following record facts are clear:

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*"The Attorney General tries to obscure the foregoing enumerated facts by asserting that the petitioners may not challenge CF&S' purported 1987 transfer because of CF&S' 1963 transfer of a part of Lakeside (apparently without Superior Court authority) to St. Timothy's Church and the Church's re-transfer of a portion thereof to Woloohojian Realty. (Brief 3). This matter was first raised below in March, 1988 by an R&F motion to dismiss on grounds that the petitioners had not joined necessary parties. Petitioners opposed on grounds *inter alia*, that "intervening equities" including the church sanctuary and the several housing units which had since been constructed, citing (*Fitzgerald v. O'Connell* 120 R.I. 24, 386 A.2d 1384 (1978) and *Chase v. Chase,* 20 R.I. 202, 37 A. 80 (1897), but were overruled and directed to serve an amended complaint adding the Church and Woloohojian. In their amended verified complaint, calling attention to such intervening equities, the petitioners asked that the Church's title and Woloohojian's be confirmed. ("One who seeks equity must do equity".)

Eight months later, when the matter came up at pre-briefing conference before the R.I. Supreme Court in November, 1988, the Court suggested that the briefing order provide, as it did, that the plaintiffs by reason of "intervening equities" did not challenge these conveyances. (Respondent R&F appendix, RA-7). This step effectively removed the Church and Woloohojian from the litigation. No one, least of all the Attorney General, took exception. What the Attorney General now seems to say is that two wrongs make a right. It is noted that CF&S' apparent evasion of Superior Court jurisdiction in 1963 did not prevent its claiming additional Lakeside *cy pres* trust property in later years. *See R.I. Hospital Trust v. Israel,* 119 R.I. 298, 377 A.2d 341 (1977). (Neither the foregoing 1977 opinion nor, to petitioners' knowledge, the record in that case, contains any reference to the aforementioned 1963 transfer.)

1. The Attorney General and his office was not notified of the June 12, 1987, back-to-back real estate transactions among respondents CF&S, Sherry and R&F. *See* petitioner Paul Huling's May 19, 1988 affidavit, P.A. 18-19. Indeed, Assistant Attorney General Murray said just that at the November 10, 1987 plaintiff Naughton deposition; the transcript so shows (P.A. 19). (There is no contrary record evidence, a CF&S assertion notwithstanding.).

2. CF&S' August 17, 1987 memorandum below contained the pointed statement that the "administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause even to investigate this land transaction." (P.A. 30) CF&S repeated its statement, word-for-word in its April 26, 1988 summary judgment memorandum. (P.A. 42; *see also,* Attorney General's brief 6). Except as immediately hereinafter stated, the record contains no contradiction.

3. It was surprising to the petitioners, at February 13, 1989 appellate oral argument, to hear the Assistant Attorney General say that his office had made inquiry and has prepared an opinion or finding of no fault with CF&S' June 1987 sale of the Lakeside property for private development. During February 13 oral argument and again in its February 23 order/decision, the court below was visibly impressed by these Attorney General statements. (P.A. 1-3) Petitioners so noted in their February 28, 1989 application for reargument (P.S.S.A. 34-35; petition herein 22, 27-28).

4. In their February 28 reargument application, the petitioners stressed that the record contained *no* such opinion or finding and protested the court's below's deference to, if not acceptance of, a thus-far undocumented Attorney General opinion or finding which the petitioners had never seen. (P.S.S.A. 34-35; petition 9-10, 22).

5. The Attorney General had an opportunity to cast light on this matter in his March 13, 1989 memorandum, filed in opposition to the petitioners' February 28 reargument application, but chose to make no mention of the subject. (Petition 3n, 22n). Reargument denial followed shortly. (P.A. 3)

Under these circumstances, the Attorney General should have made full disclosure by promptly filing his opinion/finding and giving the

petitioners an opportunity to respond. If there was no such document, as the Attorney General now seems to say (7), this too should have been fully and promptly disclosed. Maintaining silence was manifestly unfair to the petitioners and denied them due appellate process.

Conclusion

The petitioners brought their class action not for personal gain, but to protect their homes, their neighborhood, their environment and quality of life. They were shamelessly railroaded below. Such fundamental unfairness must not be allowed to stand. As provided in 28 U.S.A. Section 2106, this case should be summarily remanded for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
September 1, 1989

Respectfully submitted,
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PETITIONERS' THIRD SUPPLEMENTAL APPENDIX

Excerpts from Plaintiffs' Supplemental Answers to Defendant's Interrogatories, verified January 24, 1988.

18. Itemize all of the so-called damages, recreational, environmental and monetary allegedly suffered by the Plaintiffs, setting forth the duty owed by Defendant Children's Friend and Service, Inc. to each of the Plaintiffs respectively.

18. *** The recreational value of the property at issue is demonstrated by the multitude of recreational activities — both indoors and outdoors — summarized in the response to Nos. 4 and 5 above to which defendant's attention is again directed. The recreational damage is simply incalculable. The property's facility building has visibly deteriorated since June, 1987.

The environmental damage is even more severe. The Warwick Pond property at issue, particularly when coupled with the adjoining State owned open acreage, is a mid-Rhode Island environmental oasis. The property's flora, fauna, fish, brook tributary/estuary to Narragansett Bay, and its marshlands constitute a biologically unique ecosystem. There is nothing like the Warwick Pond property for miles. Warwick Pond is an environmental enclave bounded as it is by an airport, shopping centers and existing residential development. The phosphorous and other pollutants which would ultimately reach Warwick Pond through the threatened development, could have a devastating effect on its water quality. Development of the Warwick Pond property could set off a biological chain reaction which would ultimately lead to the permanent and irreparable destruction of its natural beauty. The loss of Warwick Pond would adversely impact the quality of life for the entire community.

The environmental importance of the property at issue has been recognized by a host of persons other than the plaintiffs. These include the Audubon Society of Rhode Island whose aforementioned annexed letter to the plaintiff Foster is an excellent summary of the damage which would result from the loss of this unique open space. The plaintiffs adopt the Audubon statement *in toto*.*

*Reproduced in petitioners' appendix herein, P.A. 26-29.

Similar recognition has been provided by the Rhode Island Natural Heritage Preservation Commission and the RI Governor's Advisory Council acting through the Department of Environmental Management. These agencies have evaluated the property at issue on a "natural, scenic, ecological, educational or agricultural" basis and by September 18, 1987 letters informed the plaintiff Warwick Land Trust that, if necessary, some $400,000.00 in State funds and a $250,000.00 loan committment is available to ensure the preservation of this open space in perpetuity. At a special session held September 8, 1987 the RI General Assembly unanimously recognized the vital interest which our entire State has in preserving open space, *as did the Rhode Island electorate in November 3, 1987 (see No. 13 above)* regardless of specific location.

The monetary damage to the plaintiffs and their neighbors, should the defendants proceed with their intended development, will be enormous. Plaintiffs presently believe and estimate that homes on or near Warwick Pond (to the west of Warwick Avenue) would lose at least 10% of their market value. The monetary loss to other Warwick residents and, indeed, the entire City would also be substantial, perhaps incalculable. See annexed Audubon Society letter, fifth paragraph.

Amendment to Children's Friend and Service Articles of Association, January, 1950, annexed to plaintiffs' supplemental answers to interrogatories, verified January 24, 1988.

January Session, 1950.

An act in amendment of the articles of association of Children's Friend and Service, a corporation organized exclusively for charitable purposes, organized pursuant to Article III of Chapter 116 of the General Laws of Rhode Island.

It is enacted by the General Assembly as follows:

Section 1. Children's Friend and Service, and its successor or successors, a corporation operated exclusively for charitable purposes and organized pursuant to Article III of Chapter 116 of the General Laws of Rhode Island, may take and hold in fee simple or any less estate by gift, grant, bequest, devise or otherwise any lands, tenaments or other estate, real or personal, to

an amount in value not exceeding one million dollars.

Section 2. This act shall take effect upon its passage, and all acts of parts of acts inconsistent herewith are hereby repealed.

Excerpt from order following March 14, 1988 hearing directing plaintiffs to file amended complaint naming additional parties.

Order

Defendant R&F Associates ("R&F") motion to dismiss the complaint for alleged failure to join necessary parties and the plaintiffs' objections thereto, following hearing before the Court on March 14, 1988, are disposed of as follows:

1. R&F's aforesaid motion be and hereby is denied provided the plaintiffs, on or before April 1, 1988, prepare, file and deliver to a licensed constable for service, an amended complaint naming Saint Timothy's Church Corporation, Warwick, and Woloohojian Realty Corp, as additional parties;

Excerpts from plaintiffs' verified amended complaint — class action, verified March 30, 1988.

12. Saint Timothy's Church Corporation, Warwick ("the Church"), is a Rhode Island corporation with a rectory at 1799 Warwick Avenue, Warwick. The Church is named as a party pursuant to March 14, 1988 Court ruling and subsequent order and to ensure that complete relief may be granted.

13. Woloohojian Realty Corp. ("Woloohojian") is a Rhode Island corporation with an office at 20 Centerville Road, Warwick. Woloohojian is named as a party pursuant to March 14, 1988 Court ruling and subsequent order and to ensure that complete relief may be granted.

* * *

Count IV — *Declaratory Relief* (The Church and Woloohojian)

65. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 37.

66. During 1963, on its own volition and apparently without Superior Court authority, CF&S deeded a portion of the aforementioned Lakeside (Warwick Pond) real property to the

Church. Upon information and belief, the cash consideration was $117,500.

67. During the ensuing years, the Church constructed a sanctuary and a rectory upon the property.

68. Thereafter, in or about 1969 the Church deeded a portion of the aforementioned real property, described in paragraph 66 above, to Woloohojian for a cash consideration unknown to plaintiffs.

69. Thereafter, commencing in or about 1969, Woloohojian caused garden apartment buildings to be constructed on the parcel described in paragraph 68 above.

70. Neither of the foregoing transactions, referred to in paragraphs 66-69 above, was referred to in the plaintiff's August 4, 1987 verified complaint herein, the answers thereto or, to the plaintiffs' knowledge, any other prior court proceeding.

71. Between the 1963 transfer, referred to in paragraph 66 above and the Court's March 14, 1988 ruling and subsequent order, referred to in paragraphs 12 and 13 above, the following events and intervening equities have occurred:

(a) Twenty five years have passed;

(b) a portion of the aforementioned premises has been re-transferred to another party, i.e. defendant Woloohojian;

(c) a sanctuary and a rectory has been constructed at substantial additional expense to the Church and its members;

(d) garden apartments have been constructed at substantial expense to Woloohojian and/or other persons and in which a sizable number of Warwick residents now make their homes; and

(e) other material events or intervening equities.

72. Without prejudice to the plaintiffs' other claims herein, the Church's title to the real property referred to in paragraph 66 above, and that of its transferees, including Woloohojian, should be confirmed by the Court.

Class Action Allegations

73. As indicated above, plaintiffs bring this action individually and on behalf of all Rhode Island community members, espe-

cially those residing on or near or using Warwick Pond.

74. The total number of all class members is so large that their individual joinder would be impracticable.

75. As residents on or near Warwick Pond, the designated plaintiffs have a special interest in this suit and its diligent pursuit.

76. The questions of law and fact raised herein are common to all members of the class.

77. The claims presented by the designated plaintiffs herein are representative of, if not identical to, the other class members.

78. The designated plaintiffs have and will continue, fairly and adequately, to represent the class in that (a) competent counsel have been retained; (b) they have no potential or actual conflict of interest with other possible members of the class; and (c) they have and will continue to acquire the financial resources to ensure that the interests of the class will not be harmed.

Excerpt from R.I. Attorney General's R.I. Supreme Court Rule 16 (h) Pre-briefing Statement, November 17, 1988.

Appellee's Rule 16(h) Pre-Briefing Statement

Appellee, JAMES E. O'NEIL, in his capacity as Attorney General of the State of Rhode Island, and in his capacity as Administration of Charitable Trusts has been included as a defendant in Superior Court as well as co-appellee pursuant to Rhode Island General Law §18-9-5. This statute requires that the Attorney General shall be notified of all judicial proceedings affecting, or in any manner dealing with, a charitable trust or affecting, or in any manner dealing with, a trustee who holds in trust within the state property given, devised, or bequeathed for charitable, educational or religious purposes, and who administers or is under a duty to administer the property in whole or in part for these purposes within the state, and shall be deemed to be an interested party thereto. Here, appellants, FRIENDS OF WARWICK POND, et al., have alleged a breach of public and charitable trust by co-appellees, CHILDREN'S FRIEND & SERVICE INC., et al.

Family Service, Inc. v. William E. Powers, Attorney General (Providence Co., Eq. No. 21550-1951) Answer of R.I. Attorney General.

Answer of Attorney General
of the State of Rhode Island

William E. Powers, Attorney General of the State of Rhode Island, one of the respondents in the above entitled cause, makes answer to the bill of complaint in said cause or to so much thereof as he is advised it is necessary for him to make answer to, and saving to himself all manner of exceptions to, and benefit of any omissions, uncertainties and imperfections in said bill, says:

1. He has no knowledge or information as to the truth of the allegations of fact contained in said bill and therefore neither admits nor denies the same but leaves the complainant to make such proof as it may be advised.

2. If the allegations of fact contained in said bill shall be proved to be true to the satisfaction of this Court, then, in his judgment, there is no relief asked for in said bill which is contrary to the interests of the State of Rhode Island and the public.

3. WHEREFORE, he submits the rights and interests of said State of Rhode Island and its citizens and public, in so far as such rights and interests may be involved in this cause, to the protection and consideration of this Honorable Court and prays that it may determine the truth of the allegations in said bill and thereupon grant such relief as to it shall deem meet and required by the exigencies of the cause of said complainant.

STATE OF RHODE ISLAND

WILLIAM E. POWERS,
ATTORNEY GENERAL

By:

Signed: ROBERT A. COOGAN
ASSISTANT ATTORNEY GENERAL